TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 93

NEW YORK LIFE INSURANCE COMPANY, PETITIONER,

vs.

Frank Collis Bowers, Executor of
FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED APRIL 26, 1930

CERTIORARI GRANTED JUNE 2, 1930

No. 160

Frank Collis Bowers, Executor of
FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY

PETITION FOR CERTIORARI FILED MAY 26, 1930

CERTIORARI GRANTED JUNE 2, 1930

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

(34,982, 35,080)

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, Plaintiff-Appellant,

against

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York, Defendant-Appellee

STATEMENT

This suit was commenced April 28, 1923. The names of the original parties were New York Life Insurance Company, plaintiff, and Frank K. Bowers, Collector of Internal Revenue for the Second District of the State of New York, defendant, and no change has taken place in the parties. The plaintiff's complaint was filed April 28, 1923, and the defendant's answer was filed January 14, 1924. The defendant was not arrested, no bail was taken nor property attached nor arrested. Trial was had June 2, 1928, before the Honorable Julian W. Mack, Circuit Judge. No question was referred to a Commissioner, Master or Referee. The Court decided the case May 28, 1929, and final judgment was entered June 27, 1929, and the appeal was taken June 27, 1929.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN NEW YORK

L. 31-259

NEW YORK LIFE INSURANCE COMPANY, Plaintiff,

against

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York, Defendant

COMPLAINT

Now comes New York Life Insurance Company, plaintiff, and complains of Frank K. Bowers, Collector of Internal

Revenue for the Second Internal Revenue District of the State of New York, defendant, and alleges upon information and belief that:

I. This case arises under a law of the United States providing for internal revenue, to wit, under the Revenue Act of 1918, entitled "An Act to Provide Revenue and for other Purposes", approved February 24, 1919.

II. Said plaintiff now is and ever since the year 1843 has been a corporation duly organized and existing under and by virtue of the laws of the State of New York for the pur- [fol. 3] pose and engaged in the business of making insurance upon the lives of persons and all and every insurance appertaining to life, having its principal office and place of business at No. 346 Broadway, in the City of New York, in the State of New York, in the Second Internal Revenue District of said State. The defendant, Frank K. Bowers, was, during all the times hereinafter mentioned, the duly appointed, qualified and acting Collector of Internal Revenue for said Second Internal Revenue District of the State of New York.

III. The plaintiff duly made and filed with the Collector of Internal Revenue for said Second Internal Revenue District of the State of New York, on the form furnished it by the Treasury Department for that purpose, a full, complete and true return under oath of its president and treasurer of all the facts required by Section 1000 of said Revenue Act of 1918, as well as all the facts called for by said form, therein and thereby showing, and the fact was and is, that said plaintiff had no capital stock nor surplus nor contingent reserves maintained for the general use of its business, nor any reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act, and that said plaintiff was not liable for the payment of any sum as a tax or otherwise under the provisions of Section 1000 of said Revenue Act either for the year ending June 30th, 1919, or for the year ending June 30th, 1920, or for the year ending June 30th, 1921, or for the year ending June 30th, 1922, or for any one of said years or for any other time, or otherwise.

[fol. 4] IV. The plaintiff made and filed its said several returns in good faith and in the honest belief that the same

contained a full, complete and true statement and return of the capital stock of said plaintiff, and of the surplus or contingent reserves maintained for the general use of its business, and of all reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, and of all the facts required by Section 1000 of said Revenue Act or called for by said form, all as required or authorized by law and the regulations of the Treasury Department. No part nor item of said several returns, or of either one of them, was willfully or intentionally false or fraudulent, nor did they or either one of them contain any willful or intentional understatement or undervaluation.

V. Said Collector duly received said several returns and forthwith transmitted the same to the Commissioner of Internal Revenue who thereupon duly received and filed them and each of them in the Treasury Department.

VI. Thereafter, and in, to wit, the year 1922, said Commissioner of Internal Revenue undertook to audit the plaintiff's accounts for said several years with respect of said Capital Stock Tax, and he there and then and in, to wit, the month of June, 1922, undertook to, and did, amend said plaintiff's said several returns, and thereby erroneously made the plaintiff appear to be liable for a Capital Stock Tax for each of said several years; and thereupon [fol. 5] said Commissioner thereafter assessed against said plaintiff a Capital Stock Tax for the year ending June 30th, 1919, in the sum of $124,500, and for the year ending June 30th, 1920, in the sum of $117,019, and for the year ending June 30th, 1921, in the sum of $108,275, and for the year ending June 30th, 1922, in the sum of $94,134; and said defendant as the Collector of said District duly served upon said plaintiff notice of each of said several assessments and demanded payment thereof, and threatened said plaintiff to impose upon it all the penalties prescribed by law and to seize and sell the plaintiff's property, if said plaintiff failed to pay said several Capital Stock Taxes and each of them on or before ten days after the date of said notice. Thereupon said plaintiff, compelled thereto by said notice and demand and by said threats of said defendant, and on,

to wit, the 4th day of November, 1922, paid said defendant as such Collector said sum of $124,500 for said period ending June 30th, 1919, and said sum of $117,019 for said period ending June 30th, 1920, and said sum of $108,275 for said period ending June 30th, 1921, and said sum of $94,134 for said period ending June 30th, 1922, but made said payments and each of them and every part and item thereof involuntarily and under a specific protest in writing, therein setting forth in detail the basis of and reasons for such protest, from the time when such taxes were paid, and there and then duly demanded refund and repayment to it of said several sums and of each and every part and item thereof, and gave due notice that unless said defendant [fol. 6] complied with said plaintiff's said demand, said plaintiff would resort to every recourse provided by law for the recovery of the same. But said defendant there and then and at all times ignored said protest and failed and refused to comply with said demand, but received and retained said several sums so paid and every part thereof. Said several Capital Stock Taxes and each and every one of them, and each and every part and item thereof, were erroneously, illegally, unjustly, wrongfully and excessively assessed and collected.

VII. Thereafter and on, to wit, the 23rd day of November, 1922, said plaintiff duly made and filed its appeal to the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and there and then duly made and filed its claim for refund of said Capital Stock Taxes and of each of them and of every part and item thereof; but said Commissioner of Internal Revenue on, to wit, the 31st day of March, 1923, decided said several appeals against the plaintiff and denied said claims for refund and each of them and every part thereof.

And thereupon said plaintiff says for its

First Cause of Action

For the Recovery of the Capital Stock Tax Paid for the Period Ending June 30th, 1919

VIII. Said plaintiff incorporates herein and makes a part hereof each and all the facts stated and allegations made

[fol. 7] in the several foregoing paragraphs hereof which are numbered respectively I, II, III, IV, V, VI and VII as fully and with the same force and effect as if they were each herein written at length.

IX. Said Capital Stock Tax for the period ending June 30th, 1919, was illegally assessed and wrongfully collected for that:

(a) Said Capital Stock Tax is a direct tax levied on specific property because of the ownership thereof on an assessed valuation to be placed thereon, and therefore is void because, being a direct tax, it is not apportioned among the several states according to numbers as required by the fourth clause of Section 9 of Article I of the Constitution of the United States.

(b) Said plaintiff is a mutual life insurance corporation engaged in the business of insuring lives on the purely mutual, level-premium plan. It has not now and never has had any capital stock, nor shares of capital stock, nor stockholders.

(c) Said plaintiff did not at the end of the calendar year 1917, which was the close of the accounting period, used by it for the purpose of making up its income tax return preceding the first day of July, 1918, and the date used by said Commissioner in making said valuation and assessment, nor at any other time during the year ending June 30th, 1918, have any surplus or contingent reserves maintained for the [fol. 8] general use of its business or otherwise, nor did it then have any reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918.

(d) Said Commissioner assessed said Capital Stock Tax for the period ending June 30th, 1919, by deducting from the market value as of December 31, 1917, of said plaintiff's total admitted assets, which said market value was the sum of $884,637,709.01, the amount of its Legal Reserves, which was $734,510,999.13, plus an item allowed as debt liabilities in the sum of $25,621,336.39, plus an exemption of $5,000, making a total deduction of $760,137,335.52, and leaving a difference of $124,500,373.49, upon which last aforesaid sum said Commissioner levied, assessed and collected

said tax of $124,500 for said period ending June 30th, 1919. But in addition to said deductions, said Commissioner should have deducted the following three items which were also each debt liabilities and which he failed and refused to deduct, to wit:

Deposits required by contract to be held for apportionment among and payment to deferred dividend policyholders	$107,041,778.00
Dividends declared on deferred dividend policies and payable absolutely	14,123,549.64
Dividends declared on annual dividend policies and payable absolutely	12,437,514.00

[fol. 9] (e) It is the essence of mutual life insurance on the level premium plan that each policyholder is entitled to his insurance at cost. Each insured, however, pays yearly in advance an estimated sum as premium and at the end of each calendar year the corporation takes an account of its affairs and thereby ascertains what was the actual cost for the year to each insured, and how much each insured over-paid for the year. The corporation then accounts to each insured for such ascertained over-payment and returns it to him at the time and in the manner agreed to in his policy contract. The plaintiff has always transacted its said business in this way.

(f) The plaintiff's outstanding policy contracts provided for returning to its policyholders this annually ascertained over-payment either as a deferred dividend or as an annual dividend. A representative deferred dividend contract provided for returning these annually ascertained over-payments substantially as follows:

"This Policy is issued on the Nonforfeiting Free Tontine Policy Plan, the particulars of which are as follows:

"That the Tontine Period for this Policy shall be completed on the — day of —— in the year ——.

"That no dividend of surplus shall be allowed or paid upon this Policy, unless the insured shall survive until completion of its Tontine Period, and unless this Policy shall then be in force.

[fol. 10] "That surplus of profits derived from such Policies on the Nonforfeiting Free Tontine Policy Plan as shall

not be in force at the date of the completion of their respective Tontine Periods, shall be apportioned among such Policies as shall complete their Tontine Periods."

The foregoing is a representative form in respect of dividends of the plaintiff's said outstanding deferred dividend contracts and in the blanks therein was inserted in each contract the date of the completion of the tontine or deferred dividend period which was the anniversary of the insurance either five, ten, fifteen or twenty years after the commencement of the contract, as agreed upon in each policy.

The plaintiff invested and accumulated at interest the annually ascertained over-payments of premiums made on its said deferred dividend contracts, and maintained and held the same as a deposit awaiting apportionment among and payment to said policyholders, and as so invested, maintained and held, the amount thereof formed at all times a part of the plaintiff's said admitted assets, and for the reasons aforesaid the amount thereof formed also at all times a part of the plaintiff's liabilities and the plaintiff carried it as a liability on its books. Out of said over-payments so maintained and held, the plaintiff, at the commencement of each year, appropriated a sum equal to the equitable share therein of all the deferred dividend policyholders whose policies provided for a dividend that year, and duly apportioned the sum so appropriated among and [fol. 11] paid it as a dividend to said policy holders in accordance with the terms of their several contracts.

A representative annual dividend policy provided for returning to the policyholders these annually ascertained over-payments substantially as follows:

"The proportion of divisible surplus accruing upon this Policy shall be ascertained and distributed annually and will not be conditioned upon the payment of the next premium. At the option of the Insured such dividend shall each year, on the anniversary of the Policy, be either

"(a) Paid in cash; or

"(b) Applied toward the payment of any premium or premiums; or

"(c) Applied to the purchase of a participating Paid-Up addition to the sum insured; or

"(d) Left to accumulate to the credit of the Policy at such rate of interest as the Company may declare on such funds."

The over-payments of premiums on the plaintiff's annual dividend policies formed a part of its said admitted assets, and also for the reasons aforesaid formed a part of its liabilities. As soon as the plaintiff ascertained at the end of each year the amount its annual dividend policyholders [fol. 12] over-paid it that year, the plaintiff duly apportioned said amount among and paid it as a dividend to said policyholders on the next anniversary of their insurance and in accordance with the terms of their several contracts.

(g) At the end of the calendar year 1917, the plaintiff maintained and held deposits in said aggregate sum of $107,041,778 which were derived as aforesaid from said annually ascertained and accumulated over-payments of premiums made by its said deferred dividend policyholders, and which its said policy contracts required it to maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax. No part of said sum of $107,041,778 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(h) At the end of the calendar year 1917, the plaintiff maintained and held further deposits in said aggregate sum of $14,123,549,64 which were also derived as aforesaid from said annually ascertained and accumulated over-payments of premiums made by said deferred dividend policyholders, and which its said policy contracts required it to [fol. 13] maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plaintiff duly apportioned

among and declared as a dividend to be paid, and which it did duly pay as a dividend, to its said deferred dividend policyholders whose several policies completed their tontine or dividend periods within the calendar year 1918. No part of said sum of $14,123,549.64 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(i) At the end of said calendar year 1917, the plaintiff maintained and held further deposits in said aggregate sum of $12,437,514 which were derived as aforesaid from the over-payments of premiums made by the plaintiff's annual dividend policyholders, and which its said policy contracts required it to apportion among and pay to its said annual dividend policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plantiff duly apportioned among and declared as a dividend to be paid to, and which it did duly pay as a dividend to, its said annual dividend [fol. 14] policyholders on the anniversaries of their insurance during the calendar year 1918. No part of said sum of $12,437,514 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

Wherefore plaintiff prays judgment on this its First Cause of Action for the sum of $124,500 with interest and costs.

Second Cause of Action

For the Recovery of the Capital Stock Tax Paid for the Period Ending June 30th, 1920

X. The plaintiff incorporates herein and makes a part hereof each and all the facts stated and allegations made

in the several foregoing paragraphs hereof which are numbered respectively I, II, III, IV, V, VI and VII, and the several foregoing sub-paragraphs of that paragraph which is numbered IX, which said sub-paragraphs are lettered respectively (a), (b), (e) and (f) as fully and with the same force and effect as if they were each herein written at length.

XI. Said Capital Stock Tax for the period ending June [fol. 15] 30th, 1920, was illegally assessed and wrongfully collected for the several reasons aforesaid and also for that:

(a) Said plaintiff did not at the end of the calendar year 1918, which was the close of the accounting period used by it for the purpose of making up its income tax return preceding the first day of July, 1919, and the date used by said Commissioner in making said valuation and assessment, nor at any other time during the year ending June 30th, 1919, have any surplus or contingent reserves maintained for the general use of its business or otherwise, nor did it then have any reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918.

(b) Said Commissioner assessed said Capital Stock Tax for the period ending June 30th, 1920, by deducting from the market value as of December 31st, 1918, of said plaintiff's total admitted assets, which said market value was the sum of $939,070,667.18, the amount of its Legal Reserves, which was $762,930,020.45, plus an item allowed as debt liabilities in the sum of $59,116,393.85 plus an exemption of $5,000, making a total deduction of $882,051,414.30 and leaving a difference of $117,019,252.88, upon which last aforesaid sum said Commissioner levied assessed and collected said tax of $117,019 for said period ending June 30th, 1920. But in addition to said deductions, said Commissioner should have deducted the following three items which were also each debt liabilities, but which he failed and refused to deduct, to wit:

[fol. 16] Deposits required by contract to be held for apportionment among and payment to deferred dividend policyholders. $100,893,328.00

Dividends declared on deferred dividend policies and payable absolutely	19,000,738.13
Dividends declared on annual dividend policies and payable absolutely	13,636,876.00

(c) At the end of the calendar year 1918, the plaintiff maintained and held deposits in said aggregate sum of $100,893,328 which were derived as aforesaid from said annually ascertained and accumulated over-payments of premiums made by its said deferred dividend policyholders, and which its said policy contracts required it to maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax. No part of said sum of $100,893,328 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(d) At the end of the calendar year 1918, the plaintiff [fol. 17] maintained and held further deposits in said aggregate sum of $19,000,738.13, which were also derived as aforesaid from said annually ascertained and accumulated over-payments of premiums made by said deferred dividend policyholders, and which its said policy contracts required it to maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plaintiff duly apportioned among and declared as a dividend to be paid, and which it did duly pay as a dividend to its said deferred dividend policyholders whose several policies completed their tontine or dividend periods within the calendar year 1919. No part of said sum of $19,000,738.13 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included

in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(e) At the end of said calendar year 1918, the plaintiff maintained and held further deposits in said aggregate sum of $13,636,876, which were derived as aforesaid from the over-payments of premiums made by the plaintiff's annual dividend policyholders, and which its said policy contracts required it to apportion among and pay to its [fol. 18] said annual dividend policyholders, and which, therefore, should not hae been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plaintiff duly apportioned among and declared as a dividend to be paid to, and which it did duly pay as a dividend to, its said annual dividend policyholders on the anniversaries of their insurance during the calendar year 1919. No part of said sum of $13,636,876 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purposes of making its income tax return, or otherwise.

Wherefore plaintiff prays judgment on this its Second Cause of Action for the sum of $117,019 with interest and costs.

Third Cause of Action

For the Recovery of the Capital Stock Tax Paid for the Period Ending June 30th, 1921

XII. Said plaintiff incorporates herein and makes a part hereof each and all the facts stated and allegations made in the several foregoing paragraphs hereof, which are numbered respectively I, II, III, IV, V, VI and VII, and in the several sub-paragraphs of that paragraph which is [fol. 19] numbered IX and which said sub-paragraphs are lettered respectively (a), (b), (e) and (f) as fully and with

the same force and effect as if they were each herein written at length.

XIII. Said Capital Stock Tax for the period ending June 30th, 1921, was illegally assessed and wrongfully collected for the several reasons aforesaid, and also for that:

(a) Said plaintiff was taxed, and duly paid the tax, for the calendar year 1921 under and pursuant to Title II, Sections 242 and 245, inclusive, of the Revenue Act of 1921, which said Title II took effect as of January 1, 1921, and which expressly provides that the taxes imposed upon life insurance by said Sections of said Title of said Revenue Act of 1921 shall be in lieu of the taxes imposed by said Section 1000 for said calendar year 1921 and thereafter.

(b) Said plaintiff did not at the end of the calendar year 1919, which was the close of the accounting period used by it for the purpose of making up its income tax return preceding the first day of July, 1920, and the date used by said Commissioner in making said valuation and assessment, nor at any other time during the year ending June 30th, 1920, have any surplus or contingent reserves maintained for the general use of its business, or otherwise, nor did it then have any reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918.

[fol. 20] (c) Said Commissioner assessed said Capital Stock Tax for the period ending June 30th, 1921, by deducting from the market value as of December 31st, 1919, of said plaintiff's total admitted assets, which said market value was the sum of $904,381,280.97, the amount of its Legal Reserves, which was $763,528,231.62, plus an item allowed as debt liabilities in the sum of $32,572,180.96, plus an exemption of $5,000, making a total deduction of $796,105,412.58 and leaving a difference of $108,275,868.39 upon which last aforesaid sum said Commissioner levied, assessed and collected said tax of $108,275 for said period ending June 30th, 1921. But in addition to said deductions, said Commissioner should have deducted the following three items which were also each debt liabilities, but which he failed and refused to deduct, to wit:

Deposits required by contract to be held for apportionment among and payment to deferred dividend policyholders	$88,157,964.00
Dividends declared on deferred dividend policies and payable absolutely	18,194,897.56
Dividends declared on annual dividend policies and payable absolutely	13,850,878.00

(d) At the end of the calendar year 1919, the plaintiff maintained and held deposits in said aggregate sum of $88,157,964, which were derived as aforesaid from said [fol. 21] annually ascertained and accumulated over-payments of premiums made by its said deferred dividend policyholders, and which said policy contracts required it to maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax. No part of said sum of $88,157,964 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(e) At the end of the calendar year 1919, the plaintiff maintained and held further deposits in said aggregate sum of $18,194,897.56, which were also derived as aforesaid from said annually ascertained and accumulated over-payments of premiums made by said deferred dividend policyholders, and which its said policy contracts required it to maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plaintiff duly apportioned among and declared as a dividend to be paid, and which it did duly pay as a dividend, to its said deferred dividend policy-[fol. 22] holders whose several policies completed their tontine or dividend period within the calendar year 1920. No part of said sum of $18,194,897.56 consisted of surplus

or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(f) At the end of said calendar year 1919, the plaintiff maintained and held further deposits in said aggregate sum of $13,850,878, which were derived as aforesaid from said annually ascertained over-payments of premiums made by the plaintiff's said annual dividend policyholders, and which its said policy contracts required it to apportion among and pay to its said annual dividend policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plaintiff duly apportioned among and declared as a dividend to be paid to, and which it did duly pay as a dividend to, its said annual dividend policyholders on the anniversaries of their insurance during the calendar year 1920. No part of said sum of $13,850,878 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of [fol. 23] 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

Wherefore plaintiff prays judgment on this its Third Cause of Action for the sum of $108,275 with interest and costs.

Fourth Cause of Action

For the Recovery of the Capital Stock Tax Paid for the Period Ending June 30th, 1922

XIV. The plaintiff incorporates herein and makes a part hereof each and all the facts stated and allegation made in the several foregoing paragraphs hereof which are numbered respectively I, II, III, IV, V, VI and VII, and in the

several foregoing sub-paragraphs of that paragraph which is numbered IX and which said sub-paragraphs are lettered respectively (a), (b), (e) and (f) and also that sub-paragraph which is lettered (a) of the foregoing paragraph which is numbered XIII as fully and with the same force and effect as if they were each herein written at length.

XV. Said Capital Stock Tax for the period ending June 30th, 1922, was illegally assessed and wrongfully collected for the several reasons aforesaid, and also for that:

(a) Said plaintiff did not at the end of the calendar year 1920, which was the close of the accounting period used by [fol. 24] it for the purpose of making up its income tax return preceding the first day of July, 1921, and the date used by said Commissioner in making said valuation and assessment, nor at any other time during the year ending June 30th, 1921, have any surplus or contingent reserves maintained for the general use of its business or otherwise, nor did it then have any reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918.

(b) Said Commissioner assessed said Capital Stock Tax for the period ending June 30th, 1922, by deducting from the market value as of December 31st, 1920, of said plaintiff's total admitted assets, which said market value was the sum of $897,077,860.91, the amount of its Legal Reserves, which was $765,780,772.59, plus an item allowed as debt liabilities in the sum of $37,157,929.77, plus an exemption of $5,000, making a total deduction of $802,943,702.36 and leaving a difference of $94,134,158.55 upon which last aforesaid sum said Commissioner levied, assessed and collected said tax of $94,134 for said period ending June 30th, 1922. But in addition to said deductions said Commissioner should also have deducted the following three items which were also each debt liabilities but which he failed and refused to deduct, to wit:

Deposits required by contract to be held for apportionment among and payment to deferred dividend policyholders	$76,176,646.00
[fol. 25] Dividends declared on deferred dividend policies and payable absolutely	21,015,315.87
Dividends declared on annual dividend policies and payable absolutely	16,431,339.00

(c) At the end of the calendar year 1920, the plaintiff maintained and held deposits in said aggregate sum of $76,176,646, which were derived as aforesaid from said annually ascertained and accumulated over-payments of premiums made by its said deferred dividend policyholders, and which said policy contracts required it to maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commisisoner did wrongfully and illegally include, in computing said tax. No part of said sum of $76,176,646 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(d) At the end of the calender year 1920, the plaintiff maintained and held further deposits in said aggregate sum of $21,015,315.87 which were also derived as aforesaid from said annually ascertained and accumulated over-payments of premiums made by said deferred dividend policy holders, [fol. 26] and which its said policy contracts required it to maintain and hold for apportionment among and payment to its said policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plaintiff duly apportioned among and declared as a dividend to be paid, and which it did duly pay as a dividend, to its said deferred dividend policyholders whose several policies completed their tontine or dividend periods within the calendar year 1921. No part of said sum of $21,015,315.87 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(e) At the end of the calendar year 1920, the plaintiff maintained and held further deposits in said aggregate sum of $16,431,339, which were derived as aforesaid from said annually ascertained over-payments of premiums made by the plaintiff's annual dividend policyholders and which its said policy contracts required it to apportion among and pay to its said annual dividend policyholders, and which, therefore, should not have been included, but which said Commissioner did wrongfully and illegally include, in computing said tax, and which said sum the plaintiff duly [fol. 27] apportioned among and declared as a dividend to be paid to, and which it did duly pay as a dividend to, its said annual dividend policyholders on the anniversaries of their insurance during the calendar year 1921. No part of said sum of $16,431,339 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, nor did any part thereof consist of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

Wherefore plaintiff prays judgment on this its Fourth Cause of Action for the sum of $94,134 with interest and cost.

Wherefore plaintiff prays judgment against the defendant for the sum of $443,928 with six per cent interest thereon from the 4th day of November, 1922, and costs.

James H. McIntosh, Attorney for Plaintiff. Office and Post Office Address, 55 Liberty Street, City of New York, Borough of Manhattan.

[fol. 28] Duly sworn to by Thomas A. Buckner. Jurat omitted in printing.

[fol. 29] In United States District Court

[Title omitted]

Answer

The defendant above named by his attorney, William Hayward, United States Attorney for the Southern District of New York, answering the complaint herein alleges:

First: Upon information and belief, the defendant denies each and every allegation contained in paragraph number "III" of said complaint.

Second: Answering paragraph numbered "VI" of said complaint, defendant admits that in the year 1922, the Commissioner of Internal Revenue undertook to audit plaintiff's accounts for the four taxable periods ending June 30, 1919, 1920, 1921 and 1922 with respect to plaintiff's liability for capital stock tax and that the said Commissioner of Internal Revenue in or about the time alleged in said para- [fol. 30] graph undertook to and did amend the capital stock tax returns filed by the plaintiff for the aforesaid taxable periods and that as a result of said audit, the said Commissioner of Internal Revenue thereafter assessed against the plaintiff a capital stock tax for the year ending June 30, 1919, in the sum of $124,500., and for the year ending June 30, 1920, in the sum of $117,019., and for the year ending June 30, 1921, in the sum of $108,275., and for the year ending June 30, 1922, in the sum of $94,134.; the defendant further admits that on or about November 4, 1922, the plaintiff paid to the defendant the capital stock taxes assessed against the plaintiff in the amounts and for the years above set forth and that the defendant has failed and refused to pay back to said plaintiff the capital stock taxes paid by plaintiff to defendant as aforesaid or any part thereof; except as hereinafter specifically admitted, defendant denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in said paragraph numbered "VI" of said complaint.

As to the First Alleged Cause of Action

Third: Answering paragraph numbered "VIII" of said complaint, defendant repeats and realleges, and makes a part hereof, all of the allegations contained in paragraphs numbered "First" and "Second" hereinabove set forth.

Fourth: Answering paragraph numbered "IX" of said complaint:

[fol. 31] (a) Defendant denies upon information and belief each and every allegation in sub-paragraphs "a" and "b" of said paragraph contained.

(b) Defendant denies upon information and belief each and every allegation in sub-paragraph "c" of said paragraph contained.

(c) Defendant denies upon information and belief that part of sub-paragraph "d" wherein it is alleged that the Commissioner of Internal Revenue should have allowed as proper deductions in computing the tax due, the following three items mentioned in said sub-paragraph, to wit, deposits required by contract to be held for apportionment among and payment to deferred dividend policy holders amounting to $107,041,778., dividends declared on deferred dividend policies and payable absolutely, amounting to $14,123,549.64, and dividends declared on annual dividend policies and payable absolutely, amounting to $12,437,514.

(d) Defendant denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in sub-paragraph "f" of said paragraph.

(e) Upon information and belief, defendant denies that part of sub-paragraph "g" of said paragraph numbered "IX" of said complaint wherein it is alleged that the item of $107,041,778. should not have been included by the Commissioner of Internal Revenue, and that said item was [fol. 32] wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $107,041,778 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(f) Upon information and belief, defendant denies that part of sub-paragraph "h" of said paragraph numbered "IX" of said complaint wherein it is alleged that the item of $14,123,549.64 should not have been included by said Commissioner, and was wrongfully and illegally included by said Commissioner, in computing said tax and wherein it is alleged that no part of said sum of $14,123,549.64 consisted of surplus or contingent reserves maintained for the gen-

eral use of the plaintiff's business and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(g) Upon information and belief, defendant denies that part of sub-paragraph "i" of said paragraph numbered "IX" of said complaint wherein it is alleged that the item [fol. 33] of $12,437,514. should not have been included by said Commissioner, and was wrongfully and illegally included by said Commissioner, in computing said tax and wherein it is alleged that no part of said sum of $12,437,514. consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of said Revenue Act of 1918, as of the close of the preceding accounting period, used by said plaintiff for the purpose of making its income tax return, or otherwise.

As to the Second Alleged Cause of Action

Fifth: Answering paragraph numbered "X" of said complaint, defendant repeats and realleges, and makes a part hereof, all of the allegations contained in paragraphs hereof numbered "First" and "Second" and in the sub-paragraphs of paragraph numbered "Fourth" which said sub-paragraphs are letter- respectively "a", "b" and "d".

Sixth: Answering paragraph numbered "XI" of said complaint:

(a) Defendant denies upon information and belief each and every allegation in sub-paragraph "a" of said paragraph continued.

(b) Defendant denies upon information and belief that part of sub-paragraph "b" of said paragraph "XI" [fol. 34] wherein it is alleged that the Commissioner of Internal Revenue should have allowed as proper deductions in computing the tax due, the following three items mentioned in said sub-paragraph, to wit, deposits required by contract to be held for apportionment among and payment

to deferred dividend policy holders amounting to $100,893,328, dividends declared on deferred dividend policies and payable absolutely, amounting to $19,000,738.13, and dividends declared on annual dividend policies and payable absolutely, amounting to $13,636,876.

(c) Defendant denies upon information and belief that part of sub-paragraph "c" of said paragraph numbered "XI" of said complaint wherein it is alleged that the item of $100,893,328 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $100,893,328 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(d) Defendant denies upon information and belief that part of sub-paragraph "d" of said paragraph numbered [fol. 35] "XI" of said complaint wherein it is alleged that the item of $19,000,738.13 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $19,000,738.13 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(e) Defendant denies upon information and belief that part of sub-paragraph "e" of said paragraph numbered "XI" of said complaint wherein it is alleged that the item of $13,636,876 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of

$13,636,876 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

[fol. 36] As to the Third Alleged Cause of Action

Seventh: Answering paragraph numbered "XII" of said complaint, defendant repeats and realleges, and makes a part hereof, all of the allegations contained in paragraphs hereof numbered "First" and "Second" and in the sub-paragraphs of paragraph numbered "Fourth" which said sub-paragraphs are lettered respectively "a", "b" and "d".

Eighth: Answering paragraph numbered "XIII" of said complaint:

(a) Defendant denies that he has any knowledge or information sufficient to form a belief as to that part of sub-paragraph "a" of said paragraph numbered "XIII" of said complaint wherein it is alleged that plaintiff was taxed and duly paid the tax for the calendar year 1921 imposed under the provisions of Title II, Sections 242 to 245 inclusive, of the Revenue Act of 1921; and, upon information and belief, defendant denies each and every other allegation in said sub-paragraph "a" of said paragraph contained.

(b) Defendant denies upon information and belief each and every allegation in sub-paragraph "b" of said paragraph contained.

(c) Defendant denies upon information and belief that part of sub-paragraph "c" of said paragraph "XIII" wherein it is alleged that the Commissioner of Internal [fol. 37] Revenue should have allowed as proper deductions in computing the tax due, the following three items in said sub-paragraph, to wit, deposits required by contract to be held for apportionment among and payment to deferred dividend policy holders amounting to -88,157,964, dividends

declared on deferred dividend policies and payable absolutely, amounting to $18,194,897.56, and dividends declared on annual dividend policies and payable absolutely, amounting to $13,850,878.

(d) Defendant denies upon information and belief that part of sub-paragraph "d" of said paragraph numbered "XIII" of said complaint wherein it is alleged that the item of $88,157,964 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $88,157,964 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(e) Defendant denies upon information and belief that part of sub-paragraph "e" of said paragraph numbered "XIII" of said complaint wherein it is alleged that the [fol. 38] item of $18,194,897.56 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $18,194,897.56 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(f) Defendant denies upon information and belief that part of sub-paragraph "f" of said paragraph numbered "XIII" of said complaint wherein it is alleged that the item of $13,850,878 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum

of $13,850,878 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

[fol. 39] As to the Fourth Alleged Cause of Action

Ninth: Answering paragraph numbered "XIV" of said complaint, defendant repeats and realleges, and makes a part hereof, all of the allegations contained in paragraphs hereof numbered "First" and "Second" and in the sub-paragraphs of paragraph numbered "Fourth" which said sub-paragraphs are lettered respectively "a", "b" and "d" and also in sub-paragraph "a" of paragraph "Eighth" hereof.

Tenth: Answering paragraph numbered "XV" of said complaint:

(a) Defendant denies upon information and belief each and every allegation in sub-paragraph "a" of said paragraph contained.

(b) Defendant denies upon information and belief that part of sub-paragraph "b" of said paragraph "XV" wherein it is alleged that the Commissioner of Internal Revenue should have allowed as proper deductions in computing the tax due, the following three items mentioned in said sub-paragraph, to wit, deposits required by contract to be held for apportionment among and payment to deferred dividend policy holders amounting to $76,176,646, dividend declared on deferred dividend policies and payable absolutely, amounting to $21,015,315.87, and dividends declared on annual dividend policies and payable absolutely, amounting to $16,431,339.

(c) Defendant denies upon information and belief that part of sub-paragraph "c" of said paragraph numbered [fol. 40] "XV" of said complaint wherein it is alleged that the item of $76,176,646 should not have been included by the Commissioner of Internal Revenue, and that said item was

wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $76,176,646 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

(d) Defendant denies upon information and belief that part of sub-paragraph "d" of said paragraph numbered "XV" of said complaint wherein it is alleged that the item of $21,015,315.87 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $21,015,315.87 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

[fol. 41] (e) Defendant denies upon information and belief that part of sub-paragraph "e" of said paragraph numbered "XV" of said complaint wherein it is alleged that the item of $16,431,339 should not have been included by the Commissioner of Internal Revenue, and that said item was wrongfully and illegally included by said Commissioner, in computing said tax, and that no part of said sum of $16,431,339 consisted of surplus or contingent reserves maintained for the general use of the plaintiff's business, and that no part thereof consisted of reserves the net additions to which were included in net income under the provisions of Title II of the Revenue Act of 1918, as of the close of the preceding accounting period used by said plaintiff for the purpose of making its income tax return, or otherwise.

Wherefore defendant demands judgment dismissing the complaint with costs.

William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendant. Office & P. O. Address, U. S. Courts & Old Post Office Bldg., City of New York.

[fol. 42] *Duly sworn to by Frank K. Bowers. Jurat omitted in printing.*

[fol. 43] IN UNITED STATES DISTRICT COURT

NEW YORK LIFE INSURANCE Co., Plaintiff,

against

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York, Defendant

James H. McIntosh, Attorney for Plaintiff.

Charles H. Tuttle, United States Attorney, Attorney for Defendant; Samuel C. Coleman, of Counsel.

OPINION—May 25, 1929

MACK, Circuit Judge:

Action to recover capital stock taxes assessed under Title X of the 1918 Revenue Act; 40 Stat. 1126, tried upon stipulated facts.

The first question is whether, admitting the applicability of the 1918 Act for the years in question, the assets of plaintiff in respect to which the assessment was made were taxable thereunder. For each of the years these assets were: (1) such sums as about two weeks after the close of the year the corporate officers resolved to take out of the Un- [fol. 44] divided Surplus Account for payment as annual dividends to policy holders having the right to share in surplus on the next anniversary of their policies; (2) sums taken out of the Surplus Account in like manner for payment as accumulated dividends to holders of deferred dividend policies maturing during the course of the ensuing

year; (3) the aggregate of dividends provisionally declared out of the Surplus Account in previous years and for the year in question, to be held against deferred dividend policies maturing in future years: these were held in an Interim Accumulation Fund.

The 1918 Act provides:

"Sec. 1000 (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916:

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the [fol. 45] average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth.

(b) In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

(c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in the business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in Section 231. The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding ac-

counting period used by such company for purposes of making its income tax return: * * * "

The preceding Act of 1916 had provided merely (§407, 39 Stat. 789) that insurance companies should be taxable [fol. 46] upon the value of their capital stock minus certain deductions, with the result as set forth in Regs. 38 Art. 2b (T. D. 2383) that "Inasmuch as the basis of tax is the fair value of the stock of a corporation, mutual insurance companies and other associations not having a stock represented by shares will also be exempt from tax, in the absence of a basis for the computation of the tax." The legislative history of the 1918 Act shows clearly that Congress intended thereby to establish an effective basis of taxation for mutual life insurance companies. In spite of this evident intention plaintiff contends for an interpretation of the statute which makes it almost as wholly inoperative as the 1916 Act, not only in the present case but necessarily also in other cases.

It is argued that subdivision (b) of Section 1000, providing for the deduction of "such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included", applies also to the parts of subdivision (c), governing mutual companies. The arrangement of the provisions indicates the contrary; for example, the parts of (c) in question are isolated from (b) by another provision so wholly distinct that its placement there would be unreasonable if what followed it were intended to refer back to what preceded it. But in any event the more specific (c) would supersede (b) rather than be limited by it; fair interpretation often requires that one of two provisions be read broadly enough [fol. 47] to conflict with and override another rather than that it be limited to a meaning not inconsistent with the other. See Hopkins v. Zeigler, 259 Fed. 43, 47. The application of a capital stock tax to mutual and to stock insurance companies presents such different problems that in order to effect equality of treatment there must be formally different rules for the two, not the same rule as plaintiff contends. For example, since the capital stock tax takes account of the market value of stock as well as

the asset value, it is possible greatly to enhance the assessments of insurance stock by reason of the highly valuable element of control, while the same factor must be disregarded in the assessment of mutual companies; therefore, by way of equalization, deductions allowed in the former assessments may well be denied in the latter. If these considerations did not sufficiently disprove the applicability of subdivision (b), it would be necessary to consider whether the assets here in question are such as (b) refers to, in view of the fact that until they were ascertained in the middle of January of the next succeeding year there were no such specific funds or accounts on the books subject to either legal or contractural requirements specified in (b). On the other hand, in a mutual company the entire property of the company, including all deposits and reserve funds subject only to liabiilties are held "for payment to or apportionment among the policy-holders", inasmuch as they are the only ones to share therein.

Subdivision (c) taxes, inter alia, "surplus or contingent reserves maintained for the general use of the business", [fol. 48] and in my judgment the three items here in question were part of such surplus for the taxable year. They were not, as plaintiff designates them, a trust fund; and they were not a liability except in the accounting sense. The first two items existed throughout the year as an unsegregated part of the corporate assets: nobody had any claim to them as against the corporation until at the earliest the middle of January of the next year, when the directors in their discretion decided how much should be set aside for the payment of dividends. They were like any undistributed corporate surplus. The same is demonstrably true of the Interim Accumulation Fund, to which nobody could have any claim for at least thirteen months to come. It is immaterial whether the phrase "maintained for the general use of the business" modifies "surplus" as well as "contingent reserves", for in a sense any surplus of an insurance company is necessarily maintained for the general use of the business, being employed in the financial operations and available to meet obligations. If in fact any or all of these amounts had been segregated by the company and specifically maintained as trust funds for the intended beneficiaries, a totally different situation would

be presented. They would then be no part of the surplus: they could not be reached by creditors; but naturally the financial stability of the Company would be correspondingly impaired.

It is not necessary to decide whether the three items would not also be taxable as reserves (using that word in a perhaps non-technical sense) "the net additions to which [fol. 49] are included in net income under the provisions of Title II"; but certainly there is nothing in Title II which would prevent such characterization.

The contention has not been made that the amounts stipulated as surplus on hand at the end of each year in question may exceed the fair average surplus on hand during the year (not including dividends already declared for payment on anniversaries occurring later in the year, and that it may have been the intent of the statute to designate this average amount as the basis; moreover no figures have been stipulated by which the average could be computed.

We come then to the second question in the case, namely whether the capital stock tax provisions of Title X § 1000 of the 1918 Revenue Act (40 Stat. 1126) applicable to mutual life insurance companies were in force during the two years beginning July 1st of 1920 and 1921.

The Revenue Act of 1921 became law on November 23, 1921. Section 243 (42 Stat. 261) provided "That in lieu of the taxes imposed by Sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company * * *" a tax measured by income. Section 1400 (42 Stat. 320) read: "That the following parts of the Revenue Acts of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b) * * * Title X." The subdivision referred to was: "The parts of the Revenue Act of [fol. 50] 1918 which are repealed by this Act shall (unless otherwise specifically provided for in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect * * *. In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in

lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act * * *."

In my judgment the 1918 Act was in effect during the period covered by the third but not by the fourth assessment. The capital stock tax payable on July 1st of any year was for the privilege of doing business during the year just elapsed, as is shown by the fact that corporations which had not engaged in business during the preceding year were not subject thereto, even more clearly than by the fact that its measure was the average value of the capital stock during the preceding year. Therefore on July 1, 1921, plaintiff came under an absolute liability to pay taxes for the privilege theretofore exercised. A statute enacted after that date might admittedly relieve it of this liability, but such Congressional intent is not lightly to be presumed. Here on the contrary the 1921 Act specifically provided that the 1918 Act was repealed only as of January 1, 1922. It is true than an income tax was by the 1921 Act, § 243 imposed for the year beginning January 1, 1921. This section was not however, as plaintiff [fol. 51] contends, in lieu of the 1918 tax; it was in lieu of the provisions of the 1921 Act, governing the taxation of corporations generally. Without deciding whether Wilmington Trust Co. v. U. S., 28 F. (2d) 205 would be followed even if in point, it suffices that the case is distinguishable for the reason among others that the estate tax there involved was regarded by the court as imposing no liability until one year after death, a date later than the passage of the 1921 Act.

On the other hand, the tax collected under the fourth assessment was for the privilege of doing business between July 1, 1921 and June 30, 1922; it would have become due only on July 1, 1922, whereas the repeal had become effective on January 1st. It is immaterial that the taxing statute was in effect during half the period, since Congress did not and this court cannot adopt any new measure of liability or a new date for its accrual. Subdivson (b) of section 1400 does not keep the 1918 provision alive, since the tax had not accrued by January 1st and no substitute tax was to come into effect after the repeal date; the report of the Senate Finance Committee accompanying the Rev-

enue Act of 1921 likewise is not inconsistent with the foregoing. Plaintiff therefore is entitled to judgment for the sum collected pursuant to the assessment for the year ending June 30, 1922, namely, $94,134.00, together with interest.

Julian W. Mack, U. S. Circuit Judge.

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECISION AND ORDER FOR JUDGMENT—June 27, 1929

The parties hereto having duly filed with the Clerk of the said Court a stipulation in writing waiving a jury and agreeing therein that the Court might try and determine the case without the intervention of a jury, thereupon said cause came on to be heard before the Honorable Julian W. Mack, United States Circuit Judge, at a stated term of the United States District Court for the Southern District of [fol. 53] New York held on the 27th day of June, 1929, at the United States Court Rooms in the Woolworth Building in the Borough of Manhattan in the City, County and State of New York in the Southern District of New York, and the plaintiff having appeared herein by James H. McIntosh, its attorney, and the defendant having appeared by Charles H. Tuttle, United States District Attorney for the Southern District of New York, its attorney, by Samuel C. Coleman, Assistant United States Attorney for the Southern District of New York, and by the Honorable Edward H. Horton, Special Attorney for the Bureau of Internal Revenue, thereupon said cause duly came on to be heard and was submitted to the Court by the respective counsel of record of the parties thereto on the pleadings and the agreed statement of facts signed by counsel for the respective parties, duly filed and made a part of the record in this cause, and upon no other evidence whatever, and the arguments of counsel.

Upon consideration whereof the Court, being fully advised in the premises, finds that said agreed statement of

facts is a full, complete and true statement of all the facts bearing upon the issues in this cause and therefore the Court makes said agreed statement of facts and each and every part and paragraph thereof and the exhibits attached thereto the findings of the Court as fully and with the same force and effect as if said agreed statement of facts and the exhibits attached thereto were herein written at length.

[fol. 54] From the pleadings and the facts so found the Court makes the following.

Conclusions of Law

First: The plaintiff is not entitled to recover on its First Cause of Action involving the capital stock tax paid for the period ending June 30, 1919. To which conclusion of law the plaintiff at the time excepted.

Second: The plaintiff is not entitled to recover on its Second Cause of Action involving the capital stock tax paid for the period ending June 30, 1920. To which conclusion of law the plaintiff at the time excepted.

Third: The plaintiff is not entitled to recover on its Third Cause of Action involving the capital stock tax paid for the period ending June 30, 1921. To which conclusion of law the plaintiff at the time excepted.

Fourth: The plaintiff on its Fourth Cause of Action is entitled to recover from the defendant the sum of Ninety-four Thousand One Hundred Thirty-four Dollars ($94,134) on account of the capital stock tax paid by it for the period ending June 30, 1922, with interest thereon at six per cent (6%) per annum from the 4th day of November, 1922, to the date of the judgment herein together with the costs of this action. To which conclusion the defendant duly excepted, praying that the court hold that the Fourth Cause [fol. 55] of Action states no cause of action. It is therefore

Ordered that the plaintiff's complaint be dismissed as to its First, Second and Third Causes of Action, respectively, and that the plaintiff have judgment against the defendant on its Fourth Cause of Action for the sum of Ninety-four Thousand One Hundred Thirty-four Dollars ($94,134) with

six per cent (6%) interest thereon from the 4th day of November, 1922, together with the costs of this suit, and the Clerk of this Court is hereby directed to tax such costs and to enter judgment hereon in accordance herewith.

Julian W. Mack, Judge.

Notice of Settlement waived.

Charles H. Tuttle U. S. Attorney.

[fol. 56] IN UNITED STATES DISTRICT COURT

No. L31-259

NEW YORK LIFE INSURANCE COMPANY, Plaintiff,

against

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York, Defendant

JUDGMENT

The parties hereto having duly filed with the Clerk of said Court a stipulation in writing waiving a jury and agreeing therein that the Court might try and determine the case without the intervention of a jury, and said cause having duly come on to be heard on the 27th day of June, 1929, and having been submitted to the Court on the pleadings and the agreed statement of facts and the arguments of counsel, and the Court, being fully advised in the premises, having duly made and filed its written decision herein whereby it found against the plaintiff on its First, Second and Third Causes of Action, and for the plaintiff on its Fourth Cause of Action, and ordered that the plaintiff's complaint be dismissed as to the First, Second and Third Causes of Action and that the plaintiff have judg-
[fol. 57] ment against the defendant on its Fourth Cause of Action for the sum of Ninety-four Thousand One Hundred and Thirty-four Dollars ($94,134) with six per cent (6%) interest thereon from the 4th day of November, 1922, and costs, and the costs of the plaintiff having been duly taxed at the sum of $18.70,

It is therefore considered and adjudged that the plaintiff's complaint be dismissed as to its First, Second and Third Causes of Action, and that the plaintiff recover of the defendant on its Fourth Cause of Action the sum of Ninety-four Thousand One Hundred Thirty-four Dollars ($94,134) with interest from November 4, 1922, according to law together with Eighteen & 70/100 ($18.70) costs as taxed and that the plaintiff have execution hereon therefor.

Alex. Gilchrist, Jr., Clerk.

Dated, New York, June 27th, 1929.

[fol. 58] IN UNITED STATES DISTRICT COURT

STIPULATION FOR TRIAL UPON AGREED STATEMENT OF FACTS

[Title omitted]

It is hereby stipulated and agreed that the issues of fact in the above enitled case may be tried and determined by the Court without the intervention of a jury upon the Agreed Statement of Facts made by the parties hereto, which shall be deemed and treated as a specific finding of fact by the Court.

New York Life Insurance Company, by James H. McIntosh, its Attorney. Frank K. Bowers, as Collector, &c., by Charles H. Tuttle, U. S. Attorney for Defendant.

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF EXCEPTIONS

Be it remembered that a jury having been duly waived in writing, this cause came on to be heard at a stated term of this Court begun and holden in the City of New York in and for the Southern District of New York on the 27th day of June, 1929, before Honorable Julian W. Mack, Circuit

Judge, upon the pleadings and the agreed statement of facts and the exhibits attached thereto signed by the respective parties hereto and filed herein, the plaintiff appearing by James H. McIntosh, its attorney, and the defendant appearing by Charles H. Tuttle, United States District Attorney for the Southern District of New York, its attorney, by Samuel C. Coleman, Assistant United States Attorney for the Southern District of New York, and by the Honorable Edward H. Horton, Special Attorney for the Bureau of Internal Revenue, which said agreed statement of facts and the exhibits attached thereto was and is as follows, to wit:

[fol. 60] AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, provided however that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

First: Plaintiff is a life insurance corporation duly incorporated in the year 1843 under a special charter, and existing under and by virtue of the laws of the State of New York. The business of the plaintiff is, and always has been, making insurance upon the lives and health of persons, and all and every insurance appertaining to life, granting annuities and making endowments. The plaintiff is a mutual company transacting the business of life insurance on the purely mutual, level premium plan and issues both "annual dividend" and "deferred dividend" policies, and has not, and never has had, any capital stock or stockholders. Each policyholder of the plaintiff is a member of the corporation. The business of the plaintiff is and always has been managed and conducted by a Board of Directors and by such officers as the Board of Directors shall authorize and appoint. The plaintiff's directors are elected by its policyholders, each policyholder whose insurance is in force and shall have been in force at least one year prior to any election is entitled to vote for the election of directors without other qualification, and no other person is entitled to vote [fol. 61] for the election of directors of the plaintiff. The plaintiff's principal office and place of business is in the

city, county and state of New York, in the Second Internal Revenue District in said state. It commenced its said business in the year 1845, and has ever since been, and still is, engaged in such business, and continuously for more than twenty-five years last past the plaintiff has been duly licensed to transact, and has been engaged in transacting its said business of life insurance in the several states, territories and possessions of the United States, in the District of Columbia and in many foreign countries. Its insurance policies are all issued on the mutual, level premium plan.

Second: Plaintiff duly made and filed with the Collector of Internal Revenue for the Second Internal Revenue District of the State of New York on forms prescribed by the Treasury Department for that purpose, under the oath of its President and Treasurer, original and amended returns for the several fiscal years ending June 30, 1919, June 30, 1920, June 30, 1921, and June 30, 1922, for the special taxes imposed by Section 1,000, Title X, of the Revenue Act of 1918, ordinarily referred to as "Capital Stock Tax", said original and amended returns showing no capital stock taxes due from said plaintiff under said Section 1000 for said fiscal years or any of them.

Third: Plaintiff made and filed its said capital stock tax returns for said respective periods in good faith and in the honest belief that the same contained a full, complete and [fol. 62] true return for the purposes of said tax and no part or item of said return was wilfully false or fraudulent, nor did said return contain any wilful or intentional understatement or undervaluation.

Fourth: Thereafter the Commissioner of Internal Revenue, as the result of a final audit of plaintiff's several returns, determined and found and duly assessed against said plaintiff capital stock taxes as follows:

For the year ending June 30, 1919	$124,500.00
For the year ending June 30, 1920	117,019.00
For the year ending June 30, 1921	108,275.00
For the year ending June 30, 1922	94,134.00

Fifth: Thereafter defendant as Collector of said District duly served upon said plaintiff notice of each of said several assessments and demanded payment thereof, and said plain-

tiff on November 4, 1922, pursuant to said notice and demand and to avoid the imposition of threatened penalties for nonpayment thereof, paid to said defendant involuntarily and under written protest said capital stock taxes and each of them.

Sixth: Thereafter, on November 23, 1922, plaintiff duly filed, in accordance with law and the Regulations of the Secretary of the Treasury, its claim for refund of said capital stock taxes theretofore paid by it on November 4, 1922, and each of them and of every part and item thereof, which claim for refund was duly rejected by said Commis- [fol. 63] sioner of Internal Revenue on March 31, 1923, and no part of said capital stock taxes, as aforesaid paid by said plaintiff, have been refunded.

Seventh: Plaintiff's insurance policies are all issued on the mutual, level premium plan. The level premium plan is one under which the maximum annual contribution which any member can be asked to pay is uniform throughout the life of the policy. The person insured pays during his early years a sum in excess of the current cost of his insurance. The excess is devoted to the creation of a reserve fund, which enables the insurance to be maintained in the later years, which the stipulated level premium would be insufficient to meet the current cost of insurance on the level premium plan. It is the essence of mutual life insurance on the level premium plan that each policyholder is entitled to receive his insurance at cost; the company collecting its estimated or level premiums in advance and adjusting the actual cost afterwards when cost is known.

Eighth: The Table Rate of Premium provided for in life insurance on the mutual, level premium plan is calculated, first, by adopting an accepted table of mortality showing the death rate for each age of life; and second, by adopting an assumed rate of interest such as the company may safely expect to realize upon its invested assets for the duration of all its policies. With these two factors it is calculated just what sum each insured must pay yearly in advance so [fol. 64] as to put the company in funds with which to pay all outstanding policies as they become claims, provided deaths occur exactly in accordance with the Table of Mortality, and also provided the rate of interest earned on the

company's invested funds is exactly the same as the rate assumed in calculating its premiums. The sum ascertained in this way is called the net or mathematical premium. But the net or mathematical premium is not the full amount each member must pay into a going concern, because it contains no provision for expense of management and unforeseen contingencies such as excess mortality, diminished interest, investment losses, increased taxation, and the like. Therefore, to provide for these, there is added to the net or mathematical premium a sum technically called "loading". The net or mathematical premium plus the loading constitutes the company's Table Rate of Premium or level premium, and is the estimated sum named in the policy as premium to be paid in advance and adjusted to cost when cost is known, and is the maximum sum which the company can ever require the insured to pay.

Ninth: Article VIII of plaintiff's charter provides as follows:

"As soon as practicable after the 31st day of December each year, the officers of said corporation shall cause a statement to be made of the true state of its affairs and shall well and truly ascertain the surplus earned by it during said year, which said ascertainment of surplus shall [fol. 65] be binding and conclusive upon every person entitled to share in its surplus."

In addition, the laws of the State of New York, and of other states in which plaintiff does business require that such an account be taken, and plaintiff as soon as practicable after the end of each calendar year takes an account of its business for the year just ended for the purpose of ascertaining the true state of its affairs and the amount of surplus earned by it during said year, as well as the amount of surplus for the current and prior years, which in the judgment of plaintiff's Board of Directors may safely be distributed. In doing so plaintiff adds to the total sum received as premiums for such year the total sum received by it during the year from all other sources, and the total of these sums constitutes plaintiff's total receipts for such year. Plaintiff then ascertains the amount of policy claims paid for such year, the amount of its current expenses for such year, the several sums required to in-

crease its reserves, and the several sums which in the judgment of plaintiff's officers and directors are required to increase the sum held for contingencies, and adds these sums together, which deducted from plaintiff's total receipts for such year leaves a difference as thus calculated which constitutes in the judgment of plaintiff's officers and directors the overpayment of premiums or surplus contributed by its policy holders in said year subject to distribution by said Board of Directors. The last named sum [fol. 66] thus ascertained is increased by an amount transferred to plaintiff's Undivided Surplus account, the result being the total sum which in the judgment of plaintiff's officers and directors is available for distribution by said Board of Directors.

Tenth: On January 10, 1918, plaintiff's officers, pursuant to Article VIII of plaintiff's charter, submitted to plaintiff's Board of Directors a report of the true state of the affairs of said company for the year ending December 31, 1917, the reports of said plaintiff's officers for the years ending December 31, 1918, December 31, 1919, and December 31, 1920, being substantially identical in form, and differing from the report for the said year ending December 31, 1917, only, in the amounts of the several items and dates therein set forth.

Said report for said year ending December 31, 1917, shows that the surplus or overpayments of premiums made by plaintiff's policyholders for said year, as by them calculated, was the sum of $30,518,736.47, and plaintiff's officers recommended that there be added thereto the sum of $28,215,108.08, to be transferred from plaintiff's "Latent Fund for Contingencies and Dividends" (the latter representing the excess of the book value of plaintiff's assets over the market value thereof) to the "Undivided Surplus Account", making in said last named account a total of the sums of $30,518,736.47 and $28,215,108.08, or $58,733,844.55. Said officers further recommended that from said "Undivided Surplus Account" of $58,733,844.55 there be set [fol. 67] aside the sum of $46,296,330.55, and that the balance of said "Undivided Surplus Account", to wit, $12,437,514.00, be appropriated to pay dividends to those policies participating annually in surplus (annual dividend policies) on their anniversaries in the year 1918.

Said officers further recommended that out of said sum of $46,296,330.55 the sum of $12,449,468.91 be credited to plaintiff's "Security Fluctuation and General Contingency Fund", and that the balance thereof, $33,846,861.64 be credited to plaintiff's "Interim Accumulation Fund", this being the sum held by the company awaiting apportionment among and payment to its deferred dividend policyholders on the several dates named in their respective policies for paying such dividend, and thereby increasing plaintiff's said "Interim Accumulation Fund" to the sum of $121,165,327.64, out of which last named sum plaintiff's officers recommended that $14,123,549.64 be appropriated for the payment of dividends to plaintiff's deferred dividend policyholders whose policies were to mature in the year 1918, and on which the premiums were paid in full to the dates of maturity in their respective accumulation periods in 1918, and which were in force at such dates in 1918, leaving a balance in said "Interim Accumulation Fund" of $107,041,778.00, to be held by the company awaiting apportionment among and payment to its deferred dividend policyholders on the several dates named in their respective policies for paying a dividend in the years subsequent to 1918.

[fol. 68] A true and correct copy of said report and recommendations of plaintiff's said officers, dated January 10, 1918, and showing the action of plaintiff's Board of Directors January 4, 1918, adopting said recommendations, is attached hereto and made part hereof as Exhibit A, and for subsequent years as Exhibits B, C and D, respectively.

Eleventh: Plaintiff's outstanding contracts provide for accounting to its policyholders for the amount of divisible surplus, as above determined by plaintiff's Board of Directors, on two general plans—one of them known as the annual dividend plan, and the other as the deferred dividend plan—and accordingly, when the amount of divisible surplus to plaintiff's annual and deferred dividend policyholders is determined the same is divided between its annual dividend policyholders as a group and its deferred dividend policyholders as a group in proper proportion; but at the accounting the amount of divisible surplus is the same for each $1,000 of insurance on policyholders of

the same age and insurance plan whether the policy is on the deferred or is on the annual dividend plan; that is, if the amount of the determined distributable surplus apportioned to the deferred dividend policyholders as a group were distributed among them for payment during the year as is done in the case of annual dividend policies each deferred dividend policyholder would receive the same sum for each $1,000 of insurance as each annual dividend policyholder of the same age and insurance plan receives.

[fol. 69] Twelfth: A representative policy contract written on the annual dividend plan provides for accounting to the insured each year on the anniversary of his policy for the annually ascertained divisible surplus for the prior year or years as above determined as follows:

"The proportion of divisible surplus accruing on this Policy shall be ascertained and distributed annually and not otherwise, and at the option of the Insured shall each year, on the anniversary of the Policy, be either

"(1) Paid in Cash; or

"(2) Applied toward the payment of any premium or premiums; or

"(3) Applied to the purchase of participating Paid-up Additions to the Policy, or

"(4) Left to accumulate to the credit of the Policy, with compound interest at the rate of three per centum per annum, and payable at the maturity of the policy, but withdrawable on any anniversary of the Policy.

"Unless the Insured shall elect otherwise within three months after the mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of participating Paid-up Additions (Option No. 3) which may [fol. 70] be surrendered for cash at any time, and the Cash Value thereof shall not be less than the original cash dividends."

Thirteenth: In its deferred dividend policies the plaintiff agreed on a specific date named therein, usually twenty

years but in some policies ten, fifteen or other period of years after the insurance took effect, to account to the deferred dividend policyholders for the amount of the annually ascertained divisible surplus, as above determined and credited to plaintiff's deferred dividend policyholders as a class, plus accumulated interest thereon and plus a proportionate share of the accumulative overpayments of all policyholders of his class whose several policies were not in force on the date named therein for paying a dividend, and for this purpose all deferred dividend policies issued in a calendar year and providing for the payment of a dividend in the same calendar year constituted a class.

The following is plaintiff's representative form for accounting to its policyholders on the deferred dividend plan:

"This Policy is issued on the Distribution Policy Plan, the particulars of which are as follows:

"That the Distribution Period of this Policy shall be completed on the — day of ——, in the year ——.

"That no dividend of surplus shall be allowed or paid upon this Policy, unless the insured shall survive until com- [fol. 71] pletion of its Distribution Period, and unless this Policy shall then be in force.

"That surplus or profits derived from such Policies on the Distribution Policy Plan as shall not be in force at the date of the completion of their respective Distribution Periods, shall be apportioned among such Policies as shall complete the Distribution Periods.

"That after the completion of the Distribution Period, provided this policy shall not have been previously terminated, this Policy shall secure to the Insured one of the following benefits:

"First: To apply the accumulated surplus apportioned by the Company to this Policy to the purchase of an Annuity on the life of the Insured to be used in reduction of subsequent premiums on this Policy, and in case the amount accruing in any year from the Annuity shall exceed the amount of premium due thereon the excess to be paid in cash.

"Second: To continue the Policy for the original amount and withdraw in cash the accumulated surplus apportioned by the Company to this Policy.

"Third: To withdraw in cash the Entire Equity that is, the net reserve, being —— Dollars and — cents ($——), and in addition thereto the accumulated surplus aforesaid.

[fol. 72] "Fourth: To convert the Entire Equity into a Paid-up Policy, without participation in profits, for an amount to be determined by the method then in use by the Company in determining Paid-up Policies of this class; provided that this Policy is legally surrendered during the life-time of the Insured, and within ninety days from the completion of the Distribution Period, and provided further that no Paid-up Policy shall be issued for any amount in excess of the original insurance, except upon a medical re-examination satisfactory to the Company.

"Fifth: The conversion of the Entire Equity into a life Annuity upon the life of and payable to the insured.

"Sixth: To continue the Policy for the original amount and convert the apportioned surplus into a Reversionary Addition conditioned upon satisfactory re-examination.

"These benefits are at the option of the Insured; but it is understood and agreed that, not less than three months prior to the completion of the Distribution Period, the said Insured shall notify the Company, in writing, which benefit is selected; and that if no such notification shall be received, then, and in that case, the surplus apportioned to this Policy shall be applied to the purchase of an Annuity as stipulated in the 'first benefit' named above."

[fol. 73] A deferred dividend policyholder may lose or forfeit any share in the annually ascertained divisible surplus, as above determined, by lapsing or surrendering his policy, or by dying before the dividend date named in his policy, in which event the amount to which he would have become entitled remains in the fund to be distributed among and paid to the surviving members who paid their premiums and whose policies were in force on maturity of the same in the year in which the dividend became payable.

Fourteenth: Every life insurance company is required by law to file annually in each state where it transacts business in the office of the Superintendent of Insurance, or other corresponding state officer having supervision of insurance, a report showing among other things its income

and disbursements for the preceding calendar year, which report must include a statement of its assets and liabilities.

Such reports are required to be made upon uniform blank forms prepared by a committee of, and adopted by, the National Association of Insurance Commissioners, and known as "Convention Edition" Forms.

Such annual reports in the State of New York must be filed within sixty days of the close of the preceding calendar year and as of December 31st of such year.

Plaintiff duly filed with the Superintendent of Insurance of said State of New York said Convention Edition Forms for the calendar years 1916 to 1920, inclusive. (Attached hereto and made a part hereof are true copies of the first [fol. 74] five pages of each of said reports; that for the year 1916 being marked Exhibit E, that for the year 1917 being marked Exhibit F, that for the year 1918 being marked Exhibit G, that for the year 1919 being marked Exhibit H, and that for the year 1920 being marked Exhibit I.)

Fifteenth: Said Commissioner, in assessing said capital stock tax paid for the fiscal year ending June 30, 1919, deducted from the book value of plaintiff's "admitted assets" as of December 31, 1917, (shown on line 47, page 4, Exhibit F)		$934,929,381.52
1. The difference between the book-value and the market-value of said "admitted assets"	$50,291,672.51	
2. The amount of the legal reserves as shown by items 7, 8 and 9 on page 5 of Exhibit F	734,510,999.13	
3. The total of items 10 to 34, both inclusive, and items 43, 44, 45 and 46, shown on page 5 of said Exhibit F	25,621,386.39	
4. Exemption	5,000.00	
Total deductions		810,429,008.03
Leaving a difference of		$124,500,373.49

[fol. 75] upon which last aforementioned sum said Commissioner levied, assessed and collected said capital stock tax of $124,500.00 for said fiscal year ending June 30, 1919.

Sixteenth: At the end of the calendar year 1917 plaintiff had on hand as shown by its annual report as of December 31, 1917, to the Insurance Department of the State of New York, Exhibit F page 5, the following:

"Item 35. Dividends declared on or apportioned to annual dividend policies payable to policyholders to and including December 31, 1918, whether contingent upon the payment of renewal premiums or otherwise" $12,437,514.00

This item, determined as above set forth, was the amount set aside by plaintiff's Board of Directors for apportionment among and return to plaintiff's annual dividend policyholders on the anniversary of their respective policies in 1918 pursuant to the terms thereof and to a resolution passed by plaintiff's Board of Directors at their January 14, 1918, meeting, reading as follows, to wit:

"Resolved, That the remainder of the surplus, being the amount of $12,437,514.00, be appropriated from the Undivided Surplus Account, out of which shall be paid to those policies which participate annually in surplus on their anniversaries in 1918, a dividend as shown in Schedule A [fol. 76] of the Actuaries' Report, including an extra dividend to the Contribution Annual Dividend policies issued in 1908 and 1913, as shown in said Schedule A; and that inasmuch as no surplus has been earned upon the Contribution Annual Dividend policies issued in the year 1917, and dating from that year, no dividend be appropriated to such policies nor paid to them in the year 1918."

These dividends were payable and plaintiff paid them on the anniversary of each annual dividend policy whether the premiums then due were paid or not. If the insured was then living it was paid to him; if not, then to the beneficiary to its annual dividend policies issued since 1906 by the named in his policy. Plaintiff on its records often refers expression "Contribution Annual Dividend Policies".

"Item 36. Dividends declared on or apportioned to deferred dividend policies payable to policyholders to and including December 31, 1918" $14,123,549.64

This item is shown on plaintiff's Annual Report for the year ending December 31, 1917, to the Insurance Department of the State of New York (Exhibit F page 5) as Item 36, and was the aggregate amount appropriated out of plaintiff's "Interim Accumulation Fund" of $121,165,327.64 then held by plaintiff for its deferred dividend policyholders, and was declared as a dividend by plaintiff's Board of Directors at their January 14, 1918, meeting to be dis-
[fol. 77] tributed among and paid to plaintiff's deferred dividend policyholders whose several policies matured during, and upon which plaintiff was required to pay accumulated deferred dividends in, the calendar year 1918.

Covering said Item 36 plaintiff's Board of Directors at said meeting of January 14, 1918, adopted four several resolutions as follow, to wit:

"Resolved, That the sum of $293,448.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all policies with 5-Year Period dividends issued in the years 1888, 1893, and 1903, respectively, on which the premiums shall have been paid in full to their anniversaries in 1918, and which shall be in force at such anniversaries, a dividend as shown in Schedule B of the Actuaries' Report.

"Resolved, That the further sum of $13,793,549.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all Accumulation policies, on which the premiums shall have been paid in full to the dates of maturity of their respective Accumulation periods in 1918, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

"Resolved, That the further sum of $25,087.00 be appro-
[fol. 78] priated from the Interim Accumulation Fund, out of which shall be paid to all 7-Year Equalization policies issued in the year 1904, on which the premiums shall have been paid in full to their anniversaries in 1918, and which shall be in force at such anniversaries, a dividend as shown in Schedule C of the Actuaries' Report.

"Resolved, That the further sum of $11,555.64 be appropriated from the Interim Accumulation Fund, out of which shall be paid to Children's Endowment and 'Terme Fixe' and Renewable Term policies with deferred dividends maturing in the year 1918, on which the premiums shall have been paid in full to their maturity dates in 1918, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report."

Said four several items represented the total amounts of money declared as dividends payable to plaintiff's deferred dividend policyholders whose policies matured and who were entitled to receive their deferred dividends during the calendar year 1918. The amount of them was calculated as follows:

The plaintiff's accountancy department calculated the total sum that would be payable to these four several classes on the assumption that each and all of them then living would survive the dividend date named in each policy. This total sum it found to be the sum of $14,336,947.64, but as some of these insured would probably die during the [fol. 79] months between the calculation of the total dividends and the several dates the dividend to each policyholder became payable within the year 1918, the plaintiff calculated, on the basis of the Table of Mortality used in calculating the premiums, the number of those who would probably die and the total amount payable to them, and found this sum to be the sum of $213,398. Thereupon it deducted this latter sum from the total sum that would be payable if all lived, leaving a balance of $14,123,549.64 as the total sum payable to those deferred dividend policyholders on the anniversary of their policies in 1918, who were living and whose policies were then in force.

"Item 37. Amount set apart, apportioned provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36 ..... $107,041,778.00

The last above item described in the plaintiff's annual report as "Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting appor-

tionment among deferred dividend policyholders'' is a portion of what plaintiff calls in the accountancy system used by it ''The Interim Accumulation Fund'', but the above designation contained in the plaintiff's annual report and what in its office it calls the Interim Accumulation Fund mean the same fund, namely, the amounts credited to plaintiff's deferred dividend policyholders with interest accumulations added thereto, which is carried by the plaintiff in its ''Interim Accumulation Fund'' and is held by it [fol. 80] awaiting apportionment among and payment to its deferred dividend policyholders on the several dates named in their respective policies for paying a dividend; and said sum of $107,041,778.00 consisted of all the accumulated credits to all the plaintiff's deferred dividend policyholders except the accumulated credits to the plaintiff's several deferred dividend policies on which a dividend was payable during the year 1918, (Item 36) and was the balance in said accumulated deferred dividend fund after (1) adding interest to the amount of said fund held during the year 1917, and (2) Merging therein the amount of the credits to the plaintiff's said deferred dividend policyholders in 1917, and (3) after deducting therefrom the total amount of the dividends payable in 1918 to the plaintiff's deferred dividend policyholders.

A resolution passed by the plaintiff's Board of Directors on the recommendation of the plaintiff's officers at their January 14, 1918, directors' meeting relative to said Item 37, reads as follows:

''Resolved, That the sum of $33,846,861.64 be credited to the Interim Accumulation Fund. The balance of the latter account will then be equal to $121,165,327.64, this being the Reserve to be held by the Company, as shown in Schedule D of the Actuaries' Report as to the disposition of the surplus, out of which dividends are to be appropriated to Deferred Dividend policies as the dividends periods mature.''

[fol. 81] From this total sum of $121,165,327.64 was deducted the total sum declared as dividends payable to deferred dividend policyholders during 1918 (Item 36, supra) to wit, said sum of $14,123,549.64, leaving a balance in said Interim Accumulation Fund of $107,041,778. This item is

shown on plaintiff's annual report for the year ending December 31, 1917, to the Insurance Department of the State of New York (Exhibit F page 5) as Item 37.

The Commissioner of Internal Revenue in determining the plaintiff's capital stock tax liability for the fiscal year ending, June 30, 1919, refused to allow as a deduction from the plaintiff's said admitted assets the amounts shown as said Items 35, 36 and 37, or either of them.

Seventeenth: Said Commissioner, in assessing capital stock tax for the fiscal year ending June 30, 1920, deducted from the book value of the plaintiff's "admitted assets" as of December 31, 1918, (as shown on Line 47, page 4, Exhibit G) $995,087,284.86

1. The difference between the book value and the market value of said "admitted assets"	$56,016,617.68	
2. The amount of the legal reserves as shown by items 7, 8 and 9 on page 5 of Exhibit G	762,930,020.45	
[fol. 82] 3. The total of items 10 to 34, both inclusive, and items 43, 44, 45 and 46, shown on page 5 of said Exhibit G	59,116,393.85	
4. Exemption	5,000.00	
Total deductions		$878,068,031.98
Leaving a difference of		$117,019,252.88

upon which last aforementioned sum said Commissioner levied, assessed and collected said capital stock tax of $117,019.00 for said fiscal year ending June 30, 1920.

Eighteenth: At the end of the calendar year 1918 the plaintiff had on hand, as shown by its annual report as of December 31, 1918, to the Insurance Department of the State of New York, (Exhibit G page 5) the following:

"Item 35. Dividend declared on or apportioned to annual dividend policies payable to policyholders to and including December 31, 1919, whether contingent upon the payment of renewal premiums or otherwise ..... $13,636,876.00.

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the foregoing item of $13,636,876.00 [fol. 83] which was the sum set aside for apportionment among and return to the plaintiff's annual dividend policyholders on the anniversary of their respective policies in 1919 pursuant to the terms thereof and to a resolution of the Board of Directors of the plaintiff passed at their regular meeting held on the second Wednesday in January, 1919, which was in substance and effect the same as the said resolution which is set forth in the foregoing paragraph Sixteenth, except as to dates and amounts, and appropriated said sum of $13,636,876.00 as a dividend to be distributed among and paid to the plaintiff's annual dividend policyholders on the anniversary of their insurance in 1919; the resolution of said Board of Directors being made a part hereof as Exhibit B.

"Item 36. Dividends declared on or apportioned to deferred dividend policies payable to policyholders to and including December 31, 1919 ..... $19,000,738.13.

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the above item of $19,000,738.13, said sum being the aggregate amount appropriated from plaintiff's Interim Accumulation Fund at the commencement of the year 1919 and declared as a dividend and distributed among and paid to plaintiff's deferred dividend policyholders whose several policies required plaintiff to pay such dividend during such year 1919, which said dividend was duly declared by plaintiff's Board of Directors [fol. 84] at their regular meeting held on the second Wednesday in January, 1919, by resolutions in substance and effect the same as the said resolutions which are set forth in full in said paragraph Sixteenth, said resolutions for the year 1919 differing only from said resolutions above set forth in dates and amounts, and the aggregate so de-

clared as a dividend being said sum of $19,000,738.13; said resolution of said Board of Directors being made a part hereof as Exhibit B.

"Item 37. Amount set apart, apportioned provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36" $100,893,328.00

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the foregoing item of $100,893,328.00, said sum consisting of the accumulated credits to plaintiff's deferred dividend policyholders except the accumulated credits to plaintiff's several deferred dividend policies on which a dividend was payable during the year 1919 (Item 36), and was the balance in said accumulated deferred dividend fund after (1) adding interest to the amount of said fund held during the year 1918, and (2) merging therein the amount of the over-payment of premiums made by plaintiff's deferred dividend policyholders in 1918, and (3) after deducting therefrom the total amount of the dividends payable in 1919 to plaintiff's deferred dividend policyholders.

[fol. 85] A resolution similar to that quoted in paragraph Sixteenth, but differing in dates and amounts, was passed by plaintiff's Board of Directors at its regular meeting in January, 1919, relative to Item 37, and in pursuance thereof and after deducting the total sum declared as dividends payable to deferred dividend policyholders during 1919 (Item 36), the balance in said Interim Accumulation Fund was found to be said sum of $100,893,328. Said resolution of said Board of Directors is made part hereof as Exhibit B.

The Commissioner of Internal Revenue in determining plaintiff's capital stock tax liability for the fiscal year ending June 30, 1920, refused to allow as a deduction from plaintiff's said admitted assets the amounts shown as said Items 35, 36 and 37, or any of them.

Nineteenth: Said Commissioner, in assessing said capital stock tax paid for the fiscal year ending June 30, 1921, deducted from the book value of plaintiff's "Admitted assets" as of December 31, 1919, (as shown on Line 47, page 4, Exhibit H) $961,000,277.14

1. The difference between the book value and the market value of said "admitted assets"	$56,618,996.17	
2. The amount of the legal reserves as shown by items 7, 8 and 9 on page 5 of Exhibit H	763,528,231.62	
[fol. 86] 3. The total of items 10 to 34, both inclusive, and items 43, 44, 45 and 46, shown on page 5 of said Exhibit H	32,572,180.96	
4. Exemption	5,000.00	
Total deductions		$852,724,400.75
Leaving a difference of		$108,275,868.39

upon which last aforementioned sum said Commissioner levied, assessed and collected said capital stock tax of $108,275.00 for said fiscal year ending June 30, 1921.

Twentieth: At the end of the calendar year 1919 plaintiff had on hand, as shown by its annual report as of December 31, 1919, to the Insurance Department of the State of New York (Exhibit H, page 5) the following:

"Item 35. Dividends declared on or apportioned to annual dividend policies payable to policyholders to and including December 31, 1920, whether contingent upon the payment of renewal premiums or otherwise	$13,850,878.00

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the foregoing item of $13,850,878.00 which was the sum set aside for apportionment [fol. 87] among and return to plaintiff's annual dividend policyholders on the anniversary of their respective policies in 1920 pursuant to the terms thereof and to a resolution of the Board of Directors of plaintiff passed at their regular meeting held on the second Wednesday in Janu-

ary, 1920, which was in substance and effect the same as said resolution which is set forth in the foregoing paragraph Sixteenth, except as to dates and amounts, and apportioned said sum of $13,850,878.00 as a dividend to be paid to and distributed among plaintiff's annual dividend policyholders on the anniversary of their insurance in 1920; said resolution of said Board of Directors being made a part hereof as Exhibit C.

"Item #36. Dividends declared on or apportioned to deferred dividend policies payable to policyholders to and including December 31, 1920 ..... $18,194,897.56

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the above item of $18,194,897.56, said sum being the aggregate amount appropriated from plaintiff's Interim Accumulation Fund at the commencement of the year 1920 and declared as a dividend and distributed among and paid to plaintiff's deferred dividend policyholders whose several policies required plaintiff to pay such dividend during such year 1920, which said dividend was duly declared by plaintiff's Board of Directors at [fol. 88] their regular meeting held on the Second Wednesday in January, 1920, by resolution in substance and effect the same as said resolutions set forth in paragraph Sixteenth, differing therefrom only as to the dates and amounts and the aggregate so declared as a dividend being said sum of $18,194,897.56; said resolution of said Board of Directors being made a part hereof as Exhibit C.

"Item 37. Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36" $88,157,964.00

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the foregoing item of $88,157,964.00, said sum consisting of the accumulated credits to plaintiff's deferred dividend policyholders except the accumulated credits to plaintiff's several deferred dividend policies on which a dividend was payable during the year 1920 (Item 36), and was the balance in said accumulated de-

ferred dividend fund after (1) adding interest to the amount of said fund held during the year 1919 and (2) Merging therein the amount of the over-payments of premiums made by plaintiff's deferred dividend policyholders in 1919, and (3) after deducting therefrom the total amount of the dividend payable in 1920 to the plaintiff's deferred dividend policyholders.

A resolution relative to Item 37, similar to that quoted in paragraph Sixteenth, but differing only in the dates and amounts, was passed by the plaintiff's Board of Directors [fol. 89] at its regular meeting in January, 1920, and in pursuance thereof and after deducting the total sum declared as dividends payable to deferred dividend policyholders during 1920 (Item 36), the balance in said Interim Accumulation Fund was found to be said sum of $88,157,964. Said resolution of said Board of Directors is made part hereof as Exhibit C.

The Commissioner of Internal Revenue in determining the plaintiff's capital stock tax for the fiscal year ending June 30, 1921, refused to allow as a deduction from plaintiff's said admitted assets the amounts shown as said Items 35, 36 and 37, or either of them.

Twenty-first: Said Commissioner, in assessing said capital stock tax for the fiscal year ending June 30, 1922, deducted from the book value of plaintiff's "Admitted assets" as of December 31, 1920, (as shown on Line 47, page 4, Exhibit I) $966,718,469.38

1. The difference between the book value and the market value of said "admitted assets"	$69,640,608.87
2. The amount of the legal reserves as shown by items 7, 8 and 9 on page 5 of Exhibit I	765,780,772.59
[fol. 90] 3. The total of items 10 to 34, both inclusive, and items 43, 44, 45 and 46, shown on page 5 of said Exhibit I.....	37,157,929.77

4. Exemption	5,000.00	
Total deductions		$872,584,310.83
Leaving a difference of		$94,134,158.55

upon which last aforementioned sum said Commissioner levied, assessed and collected said capital stock tax of $94,134.00 for said fiscal year ending June 30, 1922.

Twenty-second: At the end of the calendar year 1920 the plaintiff had on hand, as shown by its annual report as of December 31, 1920, to the Insurance Department of the State of New York (Exhibit I, page 5) the following:

"Item 35. Dividends declared on or apportioned to annual dividend policies payable to policyholders to and including December 31, 1921, whether contingent upon the payment of renewal premiums or otherwise	$16,431,339.00

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the foregoing item of $16,431,339.00 [fol. 91] which was the sum set aside for apportionment among and return to the plaintiff's annual dividend policyholders on the anniversary of their respective policies in 1921 pursuant to the terms thereof and to a resolution of the Board of Directors of plaintiff passed at their regular annual meeting held on the second Wednesday in January, 1921, which was in substance and effect the same as said resolution which is set forth in the foregoing paragraph Sixteenth, except as to dates and amounts, and apportioned said sum of $16,431,339.00 as a dividend to be distributed among and paid to plaintiff's annual dividend policyholders on the anniversary of their insurance in 1921; said resolutions of the Board of Directors being made part hereof as Exhibit D.

"Item 36. Dividends declared on or apportioned to deferred dividend policies payable to policyholders to and including December 31, 1921"	$21,015,315.87

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the above item of $21,015,315.87,

said sum being the aggregate amount appropriated from the plaintiff's Interim Accumulation Fund at the commencement of the year 1921 and declared as a dividend and distributed among and paid to plaintiff's deferred dividend policyholders whose several policies required plaintiff to pay such dividend during such year 1921, which said dividend was duly declared by plaintiff's Board of Directors [fol. 92] at their regular meeting held on the second Wednesday in January, 1921, by resolutions in substance and effect the same as said resolutions above set forth in full in said paragraph Sixteenth, said resolutions for the year 1921 differing only in dates and amounts from said resolutions above set forth, and the aggregate so declared as a dividend was said sum of $21,015,315.87; said resolutions of said Board of Directors being made part hereof as Exhibit D.

"Item 37. Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36 ..... $76,176,646.00

The facts stated in the foregoing paragraph Sixteenth are true of and apply to the foregoing item of $76,176,646.00, said sum consisting of the accumulated credits to plaintiff's deferred dividend policyholders except the accumulated credits to plaintiff's several deferred dividend policies on which a dividend was payable during the year 1921, (Item 36), and was the balance in said accumulated deferred dividend fund after (1) adding interest to the amount of said fund held during the year 1920, and (2) merging therein the amount of the over-payment of premiums made by plaintiff's deferred dividend policyholders in 1921, and (3) after deducting therefrom the total amount of the dividend payable in 1921 to plaintiff's deferred dividend policyholders.

[fol. 93] A resolution relative to Item 37, similar to that quoted in paragraph Sixteenth, but differing only in dates and amounts, was passed by plaintiff's Board of Directors at its regular meeting in January, 1921, and in pursuance thereof and after deducting the total sum declared as dividends payable to deferred dividend policyholders during

1921 (Item 36), the balance in said Interim Accumulation Fund was found to be said sum of $76,176,646. Said resolution of said Board of Directors is made part hereof as Exhibit D.

The Commissioner of Internal Revenue in determining the plaintiff's capital stock tax liability for the fiscal year ending June 30, 1922, refused to allow as a deduction from plaintiff's said admitted assets the amounts shown as said Items 35, 36 and 37, or either of them.

Twenty-third: More than ninety per cent. of plaintiff's deferred dividend policies required the payment of the policy's shares of the accumulated credits from year to year on the anniversary of the insurance twenty years after the policy took effect. In the year 1906 the plaintiff discontinued making deferred dividend contracts and thereafter made only policies which required an annual settlement with its policyholders. The result is that its Interim Accumulation Fund has now all been paid out. The balance in said Interim Accumulation Fund after, as hereinbefore indicated, (1) adding interest to the amount of said fund held during the year, (2) merging therein the amount of the credits to plaintiff's deferred dividend policyholders [fol. 94] the preceding year, and (3) after deducting therefrom the total amount of dividends declared, was as follows:

December 31, 1921	$59,303,179.00
December 31, 1922	39,310,473.00
December 31, 1923	20,352,917.00
December 31, 1924	7,108,161.00

Twenty-fourth: The plaintiff's income tax return for the calendar year 1917 was made on the cash receipts and disbursements basis and said return was accepted and plaintiff's income tax computed on said basis by said Commissioner of Internal Revenue, and in computing plaintiff's income tax for said calendar year 1917 the amounts represented by Items 35, 36 and 37 as shown in plaintiff's annual report at December 31, 1917 (Exhibit F, page 5) were not excluded from plaintiff's gross income for 1917 as portions of actual premiums received from individual policyholders which were paid back or credited to or treated as an abatement of premiums of such policyholders within

the taxable year 1917. Nor were the amounts represented by said Items 35, 36 and 37 otherwise deducted from plaintiff's gross or net income in said Calendar year 1917, and the amount of the surplus earned by plaintiff for said calendar year 1917 which was divided among the annual dividend and deferred dividend policyholders as groups was included in plaintiff's net income and taxed for income tax purposes for the year 1917.

In the plaintiff's income tax return for the calendar year 1917, Item 35 and four per cent. of Item 36 as shown in [fol. 95] plaintiff's annual report as of December 31, 1916 (Exhibit E, p. 5) were excluded from the plaintiff's gross income of 1917 as portions of actual premiums received from individual policyholders which were paid back or credited to or treated as an abatement of premium of such individual policyholders within the year 1917. The amount of these items which were paid back or credited to policyholders in 1917 were not included by the Commissioner in assessing the capital stock tax for the fiscal year beginning July 1, 1918, and ending June 30, 1919, but in assessing said tax the Commissioner used the corresponding items as shown in plaintiff's annual report at December 31, 1917 (Exhibit F, page 5.)

Item 37 was not excluded from gross income in any year in any tax return. What was true of these items for the years stated in this paragraph was similarly true for the corresponding items in each year in question; similarly all income tax returns were made and accepted upon a cash receipts and disbursements basis.

Twenty-fifth: Plaintiff's assets are in nowise segregated or in any way ear-marked for investment purposes. The plaintiff did not separately invest the sum credited to its deferred dividend policyholders as shown by Item 37. It does not separately invest any sums held by it. All sums received by it the plaintiff invests generally and when, as in Item 37, a specific sum is held to the credit of a group, or where a sum is held to the credit of a single individual, it [fol. 96] each year at the annual account increases the sum so held with interest at the average rate earned during the preceding year on all its invested funds. The above

statement relative to Item 37 is correspondingly true of Items 35 and 36.

New York Life Insurance Company, by James H. McIntosh, its Attorney. Frank K. Bowers, Collector, &c., by Charles H. Tuttle.

[fol. 97] EXHIBIT A

CITY AND COUNTY OF NEW YORK,
State of New York,
United States of America, ss:

I certify that in the Minute Book of the Board of Directors of the New York Life Insurance Company it is recorded that at a stated meeting of said Board, held at the Home Office of said Company, 346 and 348 Broadway, New York, on 14th January, 1918, a quorum being present and acting, the President of said Company submitted the following Report; and that the Resolutions recommended therein were unanimously adopted, to wit:

"New York, January 10, 1918.

To the Board of Directors of the New York Life Insurance Company:

GENTLEMEN: The Officers of the New York Life Insurance Company hereby report that, pursuant to Article VIII of the charter of the New York Life Insurance Company, they have caused a statement to be made of the true state of the affairs of said Company for the year 1917, and have thereby ascertained that the true state of the affairs of said Company for the year is as stated in the President's Annual Report for said year.

Said Officers have caused a calculation to be made of the surplus of said Company for the year ending December 31, 1917, and now here report that the surplus of said Com-
[fol. 98] pany for the year ending December 31, 1917, is the sum of $30,518,736.47.

Said Officers recommended to the Board of Directors the adoption of the following two resolutions transferring funds from the Security Fluctuation and General Contingency Fund:

Resolved, That the sum of $375,198.00 be credited to the Annual Dividend Equalization Fund.

Resolved, That the sum of $32,279.00 be credited to the Contribution Dividend Equalization Fund.

Said Officers further recommend the adoption of the following resolution, to wit:

Resolved, That the sum of $28,215,108.08 be transferred from the Latent Fund for Contingencies and Dividends to the Undivided Surplus Account. The balance of the former account will then be equal to $2,459,945.94, being the excess of the entire assets of the Company upon the basis of book values over the entire assets of the Company upon the basis of market values.

Said Officers further recommend the adoption of the following two resolutions, setting aside from the Undivided Surplus the sum of $46,296,330.55, to wit:

Resolved, That the sum of $33,846,861.64 be credited to the Interim Accumulation Fund. The balance of the latter account will then be equal to $121,165,327.64, this being the [fol. 99] Reserve to be held by the Company, as shown in Schedule D of the Actuaries' Report as to the disposition of the surplus, out of which dividends are to be appropriated to Deferred Dividend policies as the dividend periods mature.

Resolved, That the sum of $12,449,468.91 be credited to the Security Fluctuation and General Contingency Fund.

Said Officers further recommend to the Board of Directors the adoption of the following resolution, to wit:

Resolved, That the remainder of the Surplus, being the amount of $12,437,514.00 be appropriated from the Undivided Surplus Account, out of which shall be paid to those policies which participate annually in Surplus on their anniversaries in 1918, a dividend as shown in Schedule A of the Actuaries' Report, including an extra dividend to the Contribution Annual Dividend policies issued in 1908 and 1913, as shown in said Schedule A; and that inasmuch as no surplus has been earned upon the Contribution Annual Dividend policies issued in the year 1917, and dating from that year, no dividend be appropriated to such policies nor paid to them in the year 1918.

Said Officers further recommend the adoption of the following four several resolutions, for the purpose of dividend appropriations and apportionments from the Interim Accumulation Fund, to wit:

[fol. 100] Resolved, That the sum of $293,448.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all policies with 5-Year Period dividends issued in the years 1888, 1893, 1898 and 1903, respectively, on which the premiums shall have been paid in full to their anniversaries in 1918, and which shall be in force at such anniversaries, a dividend as shown in Schedule B of the Actuaries' Report.

Resolved, That the further sum of $13,793,459.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all Accumulation policies, on which the premiums shall have been paid in full to the dates of maturity of their respective Accumulation periods in 1918, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

Resolved, That the further sum of $25,087.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all 7-Year Equalization policies issued in the year 1904, on which the premiums shall have been paid in full to their anniversaries in 1918, and which shall be in force at such anniversaries, a dividend as shown in Schedule C of the Actuaries' Report.

Resolved, That the further sum of $11,555.64 be appropriated from the Interim Accumulation Fund, out of which shall be paid to Children's Endowments and "Terme Fixe" and Renewable Term policies with deferred dividends maturing in the year 1918, on which the premius shall have [fol. 101] been paid in full to their maturity dates in 1918, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

Said Officers recommend the adoption of the following resolution:

Resolved, That during 1918 the Company credit interest on funds held by it on deposit arising from matured life insurance contracts, and on cash dividends, which were left with the Company to accumulate at interest, at the rate of four per cent instead of a less rate.

Said Officers hereby submit to the Board of Directors the Report of the Actuaries embodying the foregoing recommendations and therewith the several Schedules A, B, C and D therein referred to."

Respectfully submitted, D. P. Kingsley, President.

Attested:

Seymour M. Ballard, Secretary.

Witness my hand and the seal of said Company, this — day of ——.

——, Secretary.

[fol. 102] City and County of New York,
State of New York, ss:

Before me, the undersigned authority, personally came Seymour M. Ballard, Secretary of the New York Life Insurance Company, who, being by me duly sworn, to me acknowledged that the seal affixed to the above instrument was the corporate seal of said Company, and that it was so affixed and his name signed thereto for the purpose of certification by virtue of his official position.

Witness my hand and official seal at New York this

Exhibit B

City and County of New York,
State of New York,
United States of America, ss:

I certify that in the Minute Book of the Board of Directors of the New York Life Insurance Company it is recorded that at a stated meeting of said Board, held at the Home Office of said Company, 346 and 348 Broadway, New York, on the 13th February, 1919, a quorum being present and acting, the President of said Company submitted the following Report; and that the Resolutions recommended therein were unanimously adopted, to wit:

[fol. 103] New York, January 29, 1919.

To the Board of Directors of the New York Life Insurance Company:

GENTLEMEN: The Officers of the New York Life Insurance Company hereby report that, pursuant to Article VIII of the charter of the New York Life Insurance Company, they have caused a statement to be made of the true state of the affairs of said Company for the year 1918, and have thereby ascertained that the true state of the affairs of said Company for the year is as stated in the President's Annual Report for said year.

Said Officers have caused a calculation to be made of the surplus of said Company for the year ending December 31, 1918, and now here report that the surplus of said Company for the year ending December 31, 1918, is the sum of $23,969,689.85.

Said Officers further report that pursuant to Preambles and Resolutions adopted by the Board at its stated meeting on January 8, 1919, and in pursuance of the authority therein granted, the Officers have signed, verified, printed and filed in several of the Insurance Departments of the United States the annual statement for the year ending December 31, 1918, and as a necessary incident to such action have made disposition of the surplus in accordance with the following resolutions which said Officers now ask the Board of Directors to approve and confirm.

[fol. 104] Said Officers recommend to the Board of Directors the adoption of the following three resolutions transferring funds:

Resolved, That the sum of $67,298.00 be transferred from the Security Fluctuation and General Contingency Fund to the Annual Dividend Equalization Fund.

Resolved, That the sum of $47,150.00 be transferred from the Contribution Dividend Equalization Fund to the Security Fluctuation and General Contingency Fund.

Resolved, That the sum of $1,804,275.93 be transferred from the Security Fluctuation and General Contingency Fund to the Undivided Surplus Account.

Said Officers further recommend the adoption of the following resolution, to wit:

Resolved, That the sum of $715,198.35 be transferred from the Latent Fund for Contingencies and Dividends to the Undivided Surplus Account. The balance of the former account will then be equal to $1,744,747.59, being the excess of book values over market values on Stocks and Bonds not subject to amortization.

Said Officers further recommend the adoption of the following resolution, setting aside from the Undivided Surplus the sum of $26,489,164.13, to wit:

Resolved, That the sum of $12,852,288.13 be credited to the Interim Accumulation Fund. The balance of the lat-
[fol. 105] ter account will then be equal to $119,894,066.13, this being the Reserve to be held by the Company, as shown in Schedule D of the Actuaries' Report as to the disposition of the surplus, out of which dividends are to be appropriated to deferred dividend policies as the dividend periods mature.

Said Officers further recommend to the Board of Directors the adoption of the following resolution, to wit:

Resolved, That the remainder of the Surplus, being the amount of $13,636,876.00 be appropriated from the Undivided Surplus Account, out of which shall be paid to those policies which participate annually in Surplus on their anniversaries in 1919, a dividend as shown in Schedule A of the Actuaries' Report, including an extra dividend to the Contribution Annual Dividend policies issued in 1909 and 1914, as shown in said Schedule A; and that inasmuch as no surplus has been earned upon the Contribution Annual Dividend policies issued in the year 1918, and dating from that year, no dividend be appropriated to such policies nor paid to them in the year 1919.

Said Officers further recommend the adoption of the following four several resolutions, for the purpose of dividend appropriations and apportionments from the Interim Accumulation Fund, to wit:

Resolved, That the sum of $282,138.00 be appropriated from the Interim Accumulation Fund, out of which shall [fol. 106] be paid to all policies with 5-year Period dividends issued in the years 1889, 1894, 1899 and 1904, respectively, on which the premiums shall have been paid in full to their anniversaries in 1919, and which shall be in force at such anniversaries, a dividend as shown in Schedule B of the Actuaries' Report.

Resolved, That the further sum of $18,646,019.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all Accumulation policies, on which the premiums shall have been paid in full to the dates of maturity of their respective Accumulation periods in 1919, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

Resolved, That the further sum of $60,269.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all 7-year Equalization policies issued in the year 1905, on which the premiums shall have been paid in full to their anniversaries in 1919, and which shall be in force at such anniversaries, a dividend as shown in Schedule C of the Actuaries' Report.

Resolved, That the further sum of $12,312.13 be appropriated from the Interim Accumulation Fund, out of which shall be paid to Children's Endowments and "Terme Fixe" and Renewable Term policies with deferred dividends maturing in the year 1919, on which the premiums shall have been paid in full to their maturity dates in 1919, and which shall be in force at such dates, a dividend as shown in [fol. 107] Schedule C of the Actuaries' Report.

Said Officers recommend the adoption of the following resolution:

Resolved, that during 1919 the Company credit interest on funds held by it on deposit arising from matured life insurance contracts, and on cash dividends which were left with the Company to accumulate at interest, at the rate of four per cent instead of a less rate.

Said Officers hereby submit to the Board of Directors the Report of the Actuaries embodying the foregoing recom-

mendations and therewith the several Schedules A, B, C and D therein referred to.

Respectfully submitted, D. P. Kingsley, President.

Attested:

Seymour M. Ballard, Secretary.

Witness my hand and the seal of said Company this — day of ——.

City and County of New York,
State of New York, ss:

Before me, the undersigned authority, personally came Seymour M. Ballard, Secretary of the New York Life In- [fol. 108] surance Company, who, being by me duly sworn, to me acknowledged that the seal affixed to the above instrument was the corporate seal of said Company, and that it was so affixed and his name signed thereto for the purpose of certification by virtue of his official position.

Witness my hand and official seal at New York this

Exhibit C to Bill of Exceptions

City and County of New York,
State of New York,
United States of America, ss:

I certify that in the Minute Book of the Board of Directors of the New York Life Insurance Company it is recorded that at a stated meeting of said Board, held at the Home Office of said Company, 346 and 348 Broadway, New York, on 11th February, 1920, a quorum being present and acting, the President of said Company submitted the following Report; and that the Resolutions recommended therein were unanimously adopted, to wit:

New York, February 4, 1920.

To the Board of Directors of the New York Life Insurance Company:

Gentlemen: The Officers of the New York Life Insurance Company hereby report that, pursuant to Article VIII of

[fol. 109] the charter of the New York Life Insurance Company, they have caused a statement to be made of the true state of the affairs of said Company for the year 1919, and have thereby ascertained that the true state of the affairs of said Company for the year is as stated in the President's Annual Report for said year.

Said Officers have caused a calculation to be made of the surplus of said Company for the year ending December 31, 1919, and now here report that the surplus of said Company for the year ending December 31, 1919, is the sum of $24,070,239.89.

Said Officers further report that pursuant to Preambles and Resolutions adopted by the Board at its stated meeting on January 14, 1920, and in pursuance of the authority therein granted, the Officers have signed, verified, printed and filed in several of the Insurance Departments of the United States the annual statement for the year ending December 31, 1919, and as a necessary incident to such action have made disposition of the surplus in accordance with the following resolutions which said Officers now ask the Board of Directors to approve and confirm.

Said Officers recommend to the Board of Directors the adoption of the following two resolutions transferring funds:

Resolved, That the sum of $192,829.00 be transferred from the Annual Dividend Equalization Fund to the Security Fluctuation and General Contingency Fund.

Resolved, That the sum of $147,611.00 be transferred from the Security Fluctuation and General Contingency [fol. 110] Fund to the Contribution Dividend Equalization Fund.

Said Officers further recommend the adoption of the following resolution, to wit:

Resolved, That the sum of $358,211.15 be transferred from the Latent Fund for Contingencies and Dividends to the Undivided Surplus Account. The balance of the former account will then be equal to $1,386,536.44, being the excess of book values over market values on Stocks and Bonds not subject to amortization.

Said Officers further recommend the adoption of the following two resolutions, setting aside from the Undivided Surplus the sum of $10,577,573.04, to wit:

Resolved, That the sum of $5,459,533.56 be credited to the Interim Accumulation Fund. The balance of the latter account will then be equal to $106,352,861.56, this being the Reserve to be held by the Company, as shown in Schedule D of the Actuaries' Report as to the disposition of the surplus, out of which dividends are to be appropriated to Deferred Dividend policies as the dividends periods mature.

Resolved, That the sum of $5,118,039.48 be credited to the Security Fluctuation and General Contingency Fund.

Said Officers further recommend to the Board of Directors the adoption of the following resolution, to wit:

Resolved, That the remainder of the Surplus, being the amount of $13,850,878.00 be appropriated from the Undi- [fol. 111] vided Surplus Account, out of which shall be paid to those policies which participate annually in Surplus on their anniversaries in 1920, a dividend as shown in Schedule A of the Actuaries' Report, including an extra dividend to the Contribution Annual Dividend policies issued in 1910 and 1915, as shown in said Schedule A; and that inasmuch as no surplus has been earned upon the Contribution Annual Dividend policies issued in the year 1919, and dating from that year, no dividend be appropriated to such policies nor paid to them in the year 1920.

Said Officers further recommend the adoption of the following four several resolutions, for the purpose of dividend appropriations and apportionments from the Interim Accumulation Fund, to wit:

Resolved, That the sum of $295,000.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all policies with 5-Year Period dividends issued in the years 1885, 1890, 1895, 1900 and 1905, respectively, on which the premiums shall have been paid in full to their anniversaries in 1920, and which shall be in force at such anniversaries, a dividend as shown in Schedule B of the Actuaries' Report.

Resolved, That the further sum of $17,757,676.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all Accumulation policies, on which the premiums shall have been paid in full to the dates of maturity of their respective Accumulation periods in 1920, [fol. 112] and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

Resolved, That the further sum of $138,490.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all 7-Year Equalization policies issued in the year 1906, on which the premiums shall have been paid in full to their anniversatries in 1920, and which shall be in force at such anniversaries, a dividend as shown in Schedule C of the Actuaries' Report.

Resolved, That the further sum of $3,731.56 be appropriated from the Interim Accumulation Fund, out of which shall be paid to Children's Endowments and "Terme Fixe" and Renewable Term policies with deferred dividends maturing in the year 1920, on which the premiums shall have been paid in full to their maturity dates in 1920, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

Said Officers recommend the adoption of the following resolution:

Resolved, That during 1920 the Company credit interest on funds held by it on deposit arising from matured life insurance contracts, and on cash dividends, which were left with the Company to accumulate at interest, at the rate of four per cent. instead of a less rate.

Said Officers hereby submit to the Board of Directors the Report of the Actuaries embodying the foregoing recommendations and therewith the several Schedules A, B, C [fol. 113] and D therein referred to.

Respectfully submitted, D. P. Kingsley, President.

Attested:

Seymour M. Ballard, Secretary.

Witness my hand and the seal of said Company this — day of ——.

——, Secretary.

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

Before me, the undersigned authority, personally came Seymour M. Ballard, Secretary of the New York Life Insurance Company, who, being by me duly sworn, to me acknowledged that the seal affixed to the above instrument was the corporate seal of said Company, and that it was so affixed and his name signed thereto for the purpose of certification by virtue of his official position.

Witness my hand and official seal at New York this ——.

[fol. 114] EXHIBIT D.

CITY AND COUNTY OF NEW YORK,
State of New York,
United States of America, ss:

I certify that in the Minute Book of the Board of Directors of the New York Life Insurance Company it is recorded that at a stated meeting of said Board, held at the Home Office of said Company, 346 and 348 Broadway, New York, on 9th February, 1921, a quorum being present and acting, the President of said Company submitted the following Report; and that the Resolutions recommended therein were unanimously adopted to wit:

New York, February 9, 1921.

To the Board of Directors of the New York Life Insurance Company:

GENTLEMEN: The Officers of the New York Life Insurance Company hereby report that, pursuant to Article VII of the charter of the New York Life Insurance Company; they have caused a statement to be made of the true state of the affairs of said Company for the year 1920 and have thereby ascertained that the true state of the affairs of said Company for the year is as stated in the President's Annual Report for said year.

Said Officers have caused a calculation to be made of the surplus of said Company for the year 1920 and have there-

by ascertained that the true state of the affairs of said [fol. 115] Company for the year is as stated in the President's Annual Report for said year.

Said Officers have caused a calculation to be made of the surplus of said Company for the year, ending December 31, 1920, and now here report that the surplus of said Company for the year ending December 31, 1920, is the sum of $29,960,551.54.

Said Officers further report that pursuant to Preambles and Resolutions adopted by the Board at its stated meeting on January 12, 1921, and in pursuance of the authority therein granted, the Officers have signed, verified, printed and filed in several of the Insurance Departments of the United States the annual statement for the year ending December 31, 1920, and as a necessary incident to such action have made disposition of the surplus in accordance with the following resolutions which said Officers now ask the Board of Directors to approve and confirm.

Said Officers recommend to the Board of Directors the adoption of the following two resolutions transferring funds:

Resolved, That the sum of $459,194.00 be transferred from the Annual Dividend Equalization Fund to the Security Fluctuation and General Contingency Fund.

Resolved, That the sum of $24,804.00 be transferred from the Security Fluctuation and General Contingency Fund to the Contribution Dividend Equalization Fund.

[fol. 116] Said Officers further recommend the adoption of the following resolution, to wit:

Resolved, That the sum of $839,211.38 be transferred from the Latent Fund for Contingencies and Dividends to the Undivided Surplus Account. The balance of the former account will then be equal to $547,325.06.

Said Officers further recommend the adoption of the following two resolutions, setting aside from the Undivided Surplus the sum of $14,368,423.92, to wit:

Resolved, That the sum of $9,033,997.87 be credited to the Interim Accumulation Fund. The balance of the latter account will then be equal to $97,191,961.87, this being the

Reserve to be held by the Company, as shown in Schedule D of the Actuaries' Report as to the disposition of the surplus, out of which dividends are to be appropriated to Deferred Dividend policies as the dividend periods mature.

Resolved, That the sum of $5,334,426.05 be credited to the Security Fluctuation and General Contingency Fund.

Said Officers further recommend to the Board of Directors the adoption of the following resolution, to wit:

Resolved, That the remainder of the Surplus, being the amount of $16,431,339.00, be appropriated from the Undivided Surplus Account, out of which shall be paid to those policies which participate annually in Surplus on their an-
[fol. 117] niversaries in 1921, a dividend as shown in Schedule A of the Actuaries' Report, including an extra dividend to the Contribution Annual Dividend policies issued in 1906, 1911 and 1916, as shown in said Schedule A; and that inasmuch as no surplus has been earned upon the Contribution Annual Dividend policies issued in the year 1920, and dating from that year, no dividend be appropriated to such policies nor paid to them in the year 1921.

Said Officers further recommend the adoption of the following four several resolutions, for the purpose of dividend appropriations and apportionments from the Interim Accumulation Fund, to wit:

Resolved, That the sum of $270,626.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all policies with 5-Year Period dividends issued in the years 1886, 1891, 1896, 1901 and 1906, respectively, on which the premiums shall have been paid in full to their anniversaries in 1921, and which shall be in force at such anniversaries, a dividend as shown in Schedule B of the Actuaries Report.

Resolved, That the further sum of $20,682,242.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all Accumulation policies, on which the premiums shall have been paid in full to the dates of maturity of their respective Accumulation periods in 1921, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

[fol. 118] Resolved, That the further sum of $56,159.00 be appropriated from the Interim Accumulation Fund, out of which shall be paid to all 7-Year Equalization policies issued in the year 1900, on which the premiums shall have been paid in full to their anniversaries in 1921, and which shall be in force at such anniversaries, a dividend as shown in Schedule C of the Actuaries' Report.

Resolved, That the further sum of $6,288.87 be appropriated from the Interim Accumulation Fund, out of which shall be paid to Children's Endowments, "Terme Fixe," Renewable Term policies, and 5% X Bonds, with deferred dividends maturing in the year 1921, on which the premiums shall have been paid in full to their maturity dates in 1921, and which shall be in force at such dates, a dividend as shown in Schedule C of the Actuaries' Report.

Said Officers recommend the adoption of the following resolution:

Resolved, That during 1921 the Company credit interest on funds held by it on deposit arising from matured life insurance contracts, and on cash dividends, which were left with the Company to accumulate at interest, at the rate of four per cent. instead of a less rate.

Said Officers hereby submit to the Board of Directors the Report of the Actuaries embodying the foregoing recommendations and therewith the several Schedules A, B, C and D therein referred to.

Respectfully submitted. D. P. Kingsley, President.

[fol. 119] Attested:
Seymour M. Ballard, Secretary.

Witness my hand and the seal of said Company this — day of ——.

—— ——, Secretary.

City and County of New York,
State of New York, ss:

Before me, the undersigned authority, personally came Seymour M. Ballard, Secretary of the New York Life Insurance Company, who, being by me duly sworn, to me acknowledged that the seal affixed to the above instrument

was the corporate seal of said Company, and that it was so affixed and his name signed thereto for the purpose of certification by virtue of his official position.

Witness my hand and official seal of New York this ——.

[fol. 120]

EXHIBIT E

Annual Statement of the New-York Life Insurance Company

I.—Capital Stock

1.	Amount of Capital paid up in cash	$ 0	
2.	Amount of ledger Assets (as per balance), December 31, of previous year	$837,676,332.88	
3.	—crease of Capital during the year	0	
4.	Extended at.		$837,676,332.88

II.—Income

5.	First year's premiums on original policies without deduction for commissions or other expenses, less $ 0 for first year's reinsurance	$10,119,400.43	
6.	Surrender values applied to pay first year's premiums	0	
7.	Total first year's premiums on original policies	$10,119.400.43	
8.	Dividends applied to purchase paid-up additions and annuities	2,288,613.14	

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EXHIBIT E—Continued

9.	Surrender values applied to purchase paid-up insurance and annuities	0	
10.	Consideration for original annuities involving life contingencies	430,636.68	
11.	Consideration for supplementary contracts involving life contingencies	356,058.21	
12.	Total new premiums		13,194,708.46
13.	Renewal premiums (in addition to items 14, 16 and 17) without deduction for commissions or other expenses, less $70,117.89 for reinsurance on renewals [including $22,477.50 premiums waived for total and permanent disability]	75,781,481.53	
14.	Dividends applied to pay renewal premiums	6,578,910.44	
15.	Dividends applied to shorten the endowment or premium paying period	0	
16.	Surrender values applied to pay renewal premiums	153,640.53	
17.	Renewal premiums for deferred annuities	83,678.64	
18.	Total renewal premiums		82,597,711.14
19.	Extra premiums for total and permanent disability benefits [first year premiums, $113,-		

	207.00; Renewal premiums $244,447.00] $357,654.00; and for additional accidental death benefits [first year premiums $8,890,00; renewal premiums $857.00] $9,747.00 included in life policies		367,401.00
20.	Total premium income		96,159,820.60
21.	(A) Consideration for supplementary contracts not involving life contingencies		1,532,847.25
22.	Dividends left with the Company to accumulate interest (including surrender values of reversionary additions left on deposit $142,390.32)		680,792.37
23.	Ledger assets, other than premiums received from other companies for assuming their risks		0
24.	Gross interest on mortgage loans, per Schedule B, less $182,496.64 accrued interest on mortgages acquired during 1916	7,825,743.66	
25.	Gross interest on collateral loans, per Schedule C	8,250.00	
26.	Gross interest on bonds and dividends on stocks, less $426,447.73, accrued interest on bonds acquired during 1916, per Schedule D	20,948,990.45	
27.	Gross interest on premium notes, policy loans or liens	7,875,118.07	

Exhibit E—Continued

28.	Gross interest on deposit in trust companies and banks, per Schedule E.	512,881.94	
29.	Gross interest on other debts due the Company (give items and amounts):		
30.	. . . . .		
31.	. . . . .		
32.	Gross discount on claims paid in advance.	17,871.32	
33.	Gross rent from Company's property, including $307,693.60 for Company's occupancy of its own buildings, per Shecdule A	919,912.72	
34.	Total gross interest and rents		38,108,768.16
35.	From other sources (give items and amounts):		
36.	Commissions advanced in previous years now repaid $20,350.68; Policy Fees $4,171.02; Exchange, $768,814.13; Doubtful debts recovered $1,894.50; Bonuses received for prepayment or extension of Mortgage Loans $7,856.39; Income Tax deducted at Source $189.96		803,276.68
37.	Deposits received in guarantee of purchase of Real Estate and of Rents		219,055.00
38.	. . . . .		

39.				
40.	From Agents' balances previously charged off		0	
41.	Borrowed money (gross)*		0	
42.	Gross profit on sale or maturity of ledger assets, viz:			
	(a) Real estate, per Schedule A	100,000.00		
	(b) Bonds, per Schedule D	954,835.73		
	(c) Stocks, per Schedule D	0		
			1,054,835.73	
43.	Gross increase, by adjustment, in book value of ledger assets, viz:			
	(a) Real estate, Per Schedule A	39,342.44		
	(b) Bonds, per Schedule D (including $345,940.08 for accrual of discount)	401,857.14		
	(c) Stocks, per Schedule D	0		
	(d) Bond and Mortgage	7,737.79		
			448,937.37	
44.	Total Income			$139,008,333.16
45.	Amount carried forward			$976,684,666.04

(A) Including commuted value of instalments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of Disbursements.

*Company is at liberty to briefly state transaction, so that explanation can be carried as a footnote in Department report.

EXHIBIT E—Continued

[fol. 121]

Amount brought forward			$976,684,666.04

III.—Disbursements

1. (A) For death claims (less $36,940.81 reinsurance), $28,455,992.42; additions, $876,353.90		$29,332,346.32	
2. (A) For matured endowments (less $ 0 reinsurance), $11,348,472.88; additions, $35,951.81		11,384,424.69	
3. (a) For total and permanent disability:			
Premiums waived during the year	22,477.50		
Payments made to policy-holders during the year	15,019.50		
		37,497.00	$40,754,268.01
(b) For additional accidental death benefits		0	
4. Net amount paid for losses and matured endowments			
5. For annuities involving life contingencies			1,414,154.02
6. Premium notes and liens voided by lapse, less $ 0 restorations			0
7. Surrender values paid in cash or applied in liquidation of loans or notes			19,397,720.47
8. Surrender values applied to pay new premiums (see Income No. 6), $ 0 ; to pay renewal premiums (see Income No. 16), $153,640.53			153,640.53

9.	Surrender values applied to purchase paid-up insurance and annuities (see Income No. 9)	0
10.	Dividends paid to policy-holders in cash or applied in liquidation of loans or notes	10,289,429.70
11.	Dividends applied to pay renewal premiums (see Income No. 14)	6,578,910.44
12.	Dividends applied to shorten the endowment or premium paying period (see Income No. 15)	0
13.	Dividends applied to purchase paid-up additions and annuities (see Income No. 8)	2,288,613.14
14.	Dividends left with the Company to accumulate at interest (see Income No. 22)	538,402.05
15.	(Total paid policy-holders ..... $81,415,138.36)	
16.	Expense of investigation and settlement of policy claims, including $34,034.22 for legal expense	39,956.81
17.	Paid for claims on supplementary contracts not involving life contingencies	686,023.33
18.	Dividends and interest thereon held on deposit surrendered during the year	91,102.30
19.	Paid stockholders for interest or dividends	0
20.	Commissions to agents (less commission on reinsurance): First year's premiums, $4,767,242.19; renewal premiums, $1,975,933.57; annuities (original), $16,580.39; (renewal), $1,017.46	6,760,773.61
21.	Commuted renewal commissions	0
22.	Compensation of managers and agents not paid by commission for services in obtaining new insurance	26,043.36

Exhibit E—Continued

23.	Agency supervision and traveling expenses of supervisors (except compensation for Home Office supervision)		954,397.34
24.	Branch Office expenses, including salaries of managers and clerks not included in item 22		1,087,324.49
25.	Medical examiners' fees, $423,954.43; inspection of risks, $106,350.10		530,304.53
26.	Salaries and all other compensation of officers, directors, trustees, and Home Office employees		1,992,827.47
27.	Rent, including $307,693.60 for Company's occupancy of its own buildings, less $2,084.18 received under sublease		600,119.59
28.	Advertising, $44,435.86; printing and stationery, $268,081.60; postage, telegraph, telephone and express, $248,926.91; exchange, $ 0		561,444.37
29.	Legal expense not included in item 16		21,798.25
30.	Furniture, fixtures and safes		92,600.50
31.	Repairs and expenses (other than taxes) on real estate		290,074.62
32.	Taxes on real estate		202,991.14
33.	State taxes on premiums		968,073.02
34.	Insurance Department licenses and fees		25,569.30
35.	All other licenses, fees and taxes (give items and amounts):		
36.	Federal Corporation tax	$113,338.82	
37.	Local licenses and taxes, $51,945.55; tax on policy reserves, $60,822.00	112,767.55	

38.	Miscellaneous taxes (including $56,767.03 tax on interest receipts)	90,612.26	
			316,718.63
39.	Other disbursements (give items and amounts):		
40.	Paid agents under Nylic contracts	839,273.97	
41.	Doubtful debts marked off $8,144.81; Fire Losses, $10,947.88; Settlement of Judgment, $2,479.70; Remittances not yet adjusted, $4,100.53	25,672.92	
42.	Books, Papers and Subscriptions, $13,905.83; Special Inspection Reports, $6,138.66; Lunch for Company's employees, $93,137.14; Miscellaneous Items of Expense, $11,953.01; Legislative and Departmental Expenses, $5,985.17; Expenses Directors' Election, 1917, $1,459.91; Traveling Expenses, $15,500.60; Examination and Audits of the Company's accounts, $3,808.08	151,888.40	
43.	Miscellaneous Interest Payments, $15,557.34; Bank Charges, $8,347.57; Custody of and Insurance on Securities, $25,756.93; Premiums on Fidelity Bonds, $6,978.64; Real Estate Commissions and Fees, $5,500.00; Real Estate and Mortgage Department Expenses, $12,721.65	74,862.13	
			1,091,697.42

EXHIBIT E—Continued

44.	Agents' balance charged off		0	
45.	Borrowed money repair (gross)		0	
46.	Interest on borrowed money		0	
47.	Gross loss on sale or maturity of ledger assets, viz.:			
	(a) Real Estate, per Schedule A	0		
	(b) Bonds, per Schedule D	786,142.97		
	(c) Stocks, per Schedule D	0		
			786,142.97	
48.	Gross decrease, by adjustment, in book value of ledger assets, viz.:			
	(a) Real Estate, per Schedule A	907,440.04		
	(b) Bonds per Schedule D (including $296,259.44 for amortization of premiums)	2,144,388.17		
	(c) Stocks, per Schedule D	0		
	(d) Bond and Mortgage	373.33		
			3,052,201.54	
49.	Total Disbursements			$101,593,322.95
50.	Balance			$875,091,343.09

(A) Including commuted value of supplementary contracts—see No. 21 of Income.

IV.—Ledger Assets

1.	Book value of Real Estate (less $ 0 incumbrances), per Schedule A		$11,257,500.00
2.	Mortgage Loans on Real Estate, per Schedule B, first liens, $164,579,647.67; other than first liens, $ 0		164,579,647.67
3.	Loans secured by pledge of bonds, stocks or other collateral per Schedule C		0
4.	Loans made to policy-holders on this Company's policies assigned as collateral		156,431,663.33
5.	Premium Notes on policies in force, of which $ 0 is for first year's premiums		4,891,596.78
6.	Book value of bonds, $521,677,348.13 and stocks, $294,671.88, per Schedule D		521,972,020.01
7.	Cash in Company's office	$3,402.82	
8.	Deposits in trust companies and banks not on interest, per Schedule E	1,530,682.56	
9.	Deposits in trust companies and banks, on interest, per Schedule E	13,958,395.96	15,492,481.34
10.	Bills receivable, $544.50; agents' balance (debit, $ 0, credit, $ 0); net $ 0 Branch Office debit balances, $184,644.69; credit, $89,199.32; net, $95,445.37		95,989.87

EXHIBIT E—Continued

11.	Cash in Company's Branch Offices, $77,186.10; Cash in Transit, $293,257.99	370,444.09	
12.	Total Ledger Assets, as per "balance" on page 3		$875,091,343.09
	Non-ledger Assets		
13.	Interest due $396,334.20 and accrued, $2,197,036.55 on Mortgages, per Schedule B	2,593,370.75	
14.	Interest due, $870,950.89 and accrued, $7,147,902.80 on Bonds, per Schedule D, Part 1.	8,018,853.69	
15.	Interest due, $ 0 and accrued, $ 0 on Collateral Loans, per Schedule C, part 1	0	
16.	Interest due, $ 0 and accrued, $845,106.19 on Premium Notes, Policy Loans on Liens	845,106.19	
17.	Interest due, $ and accrued, $ on other Assets (give items and amounts):		
18.	Interest due, $32,493.00 and accrued, $36,409.00 on Bank Balance	68,902.00	
19.			
20.	Rents due, $27,831.48 and accrued, $1,036.81 on Company's property or lease	28,868.29	
21.	Total interest and rents due and accrued		11,555,100.92
22.	Market value of Real Estate over book value, per Schedule A		0
23.	Market value (not including interest in item 14), on Bonds and Stocks over book value, per Schedule D		0

24.	Due from other companies for losses or claims on policies of this Company reinsured			72,997.50
		New Business (1)	Renewals (2)	
25.	Gross premiums due and unreported on policies in force December 31, 1916 (less reinsurance premiums)	$121,853.91	$8,580,541.53	
26.	Gross deferred premiums on policies in force December 31, 1916 (less reinsurance premiums)	507,821.00	5,382,389.00 $13,962,930.53	
27.	Totals	$629,674.91	3,490,732.63	
28.	Deduct loading, 25%	157,418.73		
			$10,472,197.90	
29.	Net amount of uncollected and deferred premiums	$472,256.18		10,944,454.08
30.	All other Assets (give items and amounts):			
31.				
32.				
33.				
35.	Gross Assets			$897,663,895.59
			Deduct Assets not	
36.	Company's stock owned, $ 0 ; loans on, $ 0 ,		$ 0	
37.	Supplies, stationery, printed matter, $ 0 , furniture, fixtures, and safes $ 0		0	

EXHIBIT E—Continued

38.	Commuted commissions, $ 0 ; agents' debit balances, gross $ 0	0	
39.	Cash advanced to or in the hands of officers or agents	0	
40.	Loans on personal security, endorsed or not, $ 0 ; bills receivable, $544.50	544.50	
41.	Premium notes, policy loans and other policy assets in excess of net value and of other policy liabilities on individual policies.	0	
42.	Overdue and accrued interest on Bonds in default over market value of same	0	
43.	Market value of special deposits in excess of corresponding liabilities, per Special Deposit Schedule, Page 11.	0	
44.	Book value of Ledger Assets over market value, viz., on Stocks and Bonds	30,489,864.83	
45.	Branch Office debit balances	184,644.69	
46.			30,675,054.02
47.	Total Admitted Assets		$866,988,841.57

[fol. 123] V.—Liabilities, Surplus and Other Funds

Net present value of all the outstanding policies in force on the 31st day of December, 1916, as computed by the Insurance Department of the State of New York on the following tables of mortality and rates of interest, viz:

1.	Actuaries' tables at — per cent on*	0	
	Same for reversionary additions	0	
			0

2.	American Experience table at 3 per cent on* all insurances except those specified under 4	$586,287,574.00	
	Same for reversionary additions	6,943,790.00	
			$593,231,364.00
3.	American Experience table at — per cent on*	0	
	Same for reversionary additions	0	
			0
4.	Other tables and rates, viz:*		
	Double American Experience table at 3 per cent on tropical insurances and those on impaired lives	41,977,737.00	
	Same for reversionary additions	187,221.00	
			42,164,958.00
	Sesqui American Experience table at 3 per cent on semi-tropical insurances and those on partially impaired lives	49,842,826.00	
	Same for reversionary additions	153,650.00	
			49,996,476.00

* State definitely the dates of issue and class of policies covered by each basis of valuation.

EXHIBIT E—Continued

5.	Net present value of annuities (including those in reduction of premiums). Give tables and rates of interest, viz:		
	McClintock's Annuity table, 3 per cent	15,018,305.00	
	Total	700,411,103.00	
6.	Deduct net value of risks of this Company reinsured in other solvent companies†	114,423.00	
7.	Net Reserve (Paid-for basis)		$700,206,680.00
8.	Extra reserve for total and permanent disability benefits $295,508.00; and for additional accidental death benefits $5,573.00, included in life policies		301,081.00
9.	Present value of amounts not yet due on supplementary contracts not involving life contingencies; computed by the Company		4,885,900.35
10.	Present value of amounts incurred but not yet due for total and permanent disability benefits		175,504.00

†The net value of risks reinsured in British Companies $902,230 is not included, as these companies are not doing business in the State of NewYork, See Schedule X.

11.	Liability on policies canceled and not included in "net reserve" upon which a surrender value or reinstatement may be demanded		
12.	Claims for Death-Losses due and unpaid		436,828.38
13.	Claims for Death-Losses in process of adjustment, or adjusted and not due	0	
14.	Claims for Death-Losses reported for which no proofs have been received	2,005,941.53	
15.	Reserve for net Death-Losses incurred but unreported	3,429,067.33	
16.	Claims for Matured Endowments due and unpaid	1,500,000.00	
17.	Claims for Death-Losses and other Policy Claims resisted	1,488,050.49	
18.	Claims for total and permanent disability benefits $37,656.00; and for additional accidental death benefits $ 0 , including $3,098.98 resisted	608,409.41	
19.	Due and unpaid on Annuity Claims involving life contingencies	40,745.98	
		162,094.74	
20.	Total Policy Claims		9,234,309.48
21.	Due and unpaid on supplementary contracts not involving life contingencies		4,722.01
22.	Dividends left with the Company to accumulate at interest and accrued interest thereon		1,468,674.90
23.	Premiums paid in advance, including surrender values so applied		940,711.83
24.	Unearned interest ($3,231,535.19) and rent ($34,222.31) paid in advance		3,265,757.50
25.	Commissions due to agents on premium notes when paid		43,695.33
26.	Commissions to agents, due or accrued		9,140.81

Exhibit E—Continued

27.	"Cost of Collection" on uncollected and deferred premiums, in excess of the loading thereon	0
28.	Salaries, rents, office expenses, bills and accounts due or accrued (including $1,902.96 accrued charges on deposits)	119,351.41
29.	Medical Examiners' fees, $28,056.22; Inspectors' fees, $3,101.70; and legal fees, $3,257.27; due or accrued	34,415.19
30.	Estimated amount hereafter payable for Federal, State and other taxes based upon the business of the year of this statement (including $19,750.79 accrued taxes on Interest and Deposits)	1,398,093.78
31.	Advances by officers or others on account of expenses of organization or otherwise	0
32.	Borrowed money, $ 0 , and interest thereon, $ 0	0
33.	Unpaid dividends to stock-holders	0
34.	Dividends or other profits due policy-holders, including those contingent on payment of outstanding and deferred premiums	1,478,254.58
35.	Dividends declared on or apportioned to annual dividend policies payable to policy-holders to and including (month) December (day) 31st, 1917, whether contingent upon the payment of renewal premiums or otherwise	10,769,464.00
36.	Dividends declared on or apportioned to deferred dividend policies payable to policy-holders to and including (month) December (day) 31st, 1917	12,539,749.78
37.	Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36	87,318,466.00

38.	Reserve, special or surplus funds not included above (give items and amount separately, and state for what purpose each of said funds is held), Security Fluctuation and General Contingency fund, $26,112,815.45; Annual Dividend Equalization funds, $2,021,920.00	28,134,735.45
39.	Reserve for future expenses on Paid-up Annual Dividend policies	430,000.00
40.		
41.		
42.	All other liabilities (give items and amounts):	
43.	Due agents under Nylic contracts	7,686.79
44.	Reserve for Nylic contracts	3,450,227.00
45.	Income tax deducted at source, $6,268.56; reserve for unclaimed receipts, $20,068.44	26,337.00
46.	Guarantee deposits on real estate and rents	219,055.00
47.	Capital Stock	0
48.	Unassigned funds (surplus)	0
49.	Total	$866,988,841.57

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EXHIBIT F

Annual Statement of the New York Life Insurance Company

I.—Capital Stock

1.	Amount of Capital paid up in cash	$ 0	
2.	Amount of ledger Assets (as per balance), December 31, of previous year		$875,091,343.09

3.	—crease of Capital during the year	.0	
4.	Extended at		$875,091,343 09

II.—Income

5.	First year's premiums on original policies without deduction for commissions or other expenses, less $ 0 for first year's reinsurance	$12,653,093.29	
6.	Surrender values applied to pay first year's premiums	0	
7.	Total first year's premiums on original policies	$12,653,093.29	
8.	Dividends applied to purchase paid-up additions and annuities	2,352,130.32	
9.	Surrender values applied to purchase paid-up insurance and annuities	0	
10.	Consideration for original annuities involving life contingencies	513,938.75	
11.	Consideration for supplementary contracts involving life contingencies	298,895.50	
12.	Total new premiums		15,818,057 86

13.	Renewal premiums (in addition to items 14, 16 and 17) without deduction for commissions or other expenses, less $66,529.90 for reinsurance on renewals [including $29,785.58 premiums waived for total permanent disability]	79,157,960.50	
14.	Dividends applied to pay renewal premiums	7,599,337.57	
15.	Dividends applied to shorten the endowment or premium paying period	27,343.00	
16.	Surrender values applied to pay renewal premiums	167,108.77	
17.	Renewal premiums for deferred annuities	46,761.89	
18.	Total renewal premiums		86,998,511.73
19.	Extra premiums for total permanent disability benefits [first year premiums, $241,051.00; Renewal premiums $351,885.00] $592,936.00; and for additional accidental death benefits [first year premiums $22,682.00; renewal premiums $11,899.00] $34,581.00 included in life policies		627,517.00
20.	Total premium income		103,444,086.59
21.	(A) Consideration for supplementary contracts not involving life contingencies		1,169,695.46

(A) Including commuted value of instalments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of Disbursements.

EXHIBIT F—Continued

22.	Dividends left with the Company to accumulate at interest (including surrender values of reversionary additions left on deposit $99,989.43)		777,786.74
23.	Ledger assets, other than premiums, received from other companies for assuming their risks		0
24.	Gross interest on mortgage loans, per Schedule B, less $177,269.11 accrued interest on mortgages acquired during 1917	8,258,901.09	
25.	Gross interest on collateral loans, per Schedule C.	6,749.99	
26.	Gross interest on bonds and dividends on stocks, less $243,075.29, accrued interest on bonds acquired during 1917, per Schedule D	22,001,217.82	
27.	Gross interest on premium notes, policy loans or liens	7,831,063.23	
28.	Gross interest on deposit in trust companies and banks, per Schedule E	527,986.85	
29.	Gross interest on other debts due the Company (give items and amounts):		
30.			
31.			
32.	Gross discount on claims paid in advance	9,160.57	

33.	Gross rent from Company's property, including $284,813.48 for Company's occupancy of its own buildings, per Schedule A.	1,322,342.29	
34.	Total gross interest and rents		39,957,421.84
35.	From other sources (give items and amounts):		
36.	Commissions advanced in previous years now repaid $21,958.33; Policy Fees $4,791.46; Exchange, $534,626.19; Doubtful debts recovered $2,331.80; Bonuses received for prepayment or extension of Mortgage Loans $17,573.01; Remittances received not yet adjusted $5,054.79; Revenue stamps redeemed $191.34		586,526.92
37.	Amounts deposited on contracts for sale of real estate forfeiture of which is claimed by the Company		102,500.00
38.	. . . . .		
39.	. . . . .		
40.	From Agents' balances previously charged off . .		0
41.	Borrowed money (gross)*		0

* Company is at liberty to briefly state transaction, so that explanation can be carried as a footnote in Department report.

EXHIBIT F—Continued

42	Gross profit on sale or maturity of ledger assets, viz.:			
	(a) Real estate, per Schedule A	0		
	(b) Bonds, per Schedule D	80,144.43		
	(c) Stocks, per Schedule D	0		
			80,144.43	
43.	Gross increase, by adjustment, in book value of ledger assets, viz.:			
	(a) Real estate, per Schedule A	1,425.71		
	(b) Bonds, per Schedule D (including $440,494.90 for accrual of discount)	442,041.15		
	(c) Stocks, per Schedule D	0		
	(d) Bond and Mortgage	6,634.62		
			450,101.48	
44.	Total Income			$146,568,263.46
45.	Amount carried forward			$1,021,659,606.55

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Amount brought forward $1,021,659,606.55

III.—Disbursements

1.	(A) For death claims (less $9,828.30 reinsurance), $29,614,302.38; additions, $994,896.91		$30,599,370.99
2.	(A) For matured endowments (less $91,626.01 reinsurance), $13,631,509.67; additions, $26,525.31		13,566,408.97
3.	(a) For total permanent disability:		
	Premiums waived during the year	29,785.58	
	Payments made to policy-holders during the year	20,900.00	50,685.58
	(b) For additional accidental death benefits		0
4.	Net amount paid for losses and matured endowments		$44,216,465.54
5.	For annuities involving life contingencies		1,387,240.83
6.	Premium notes and liens voided by lapse, less $ 0 restorations		0
7.	Surrender values paid in cash or applied in liquidation of loans or notes		18,360,061.04
8.	Surrender values applied to pay new premiums (see Income No. 6), $ 0 ; to pay renewal premiums (see Income No. 16), $167,108.77		167,108.77

(A) Including commuted value of supplementary contracts—see No. 21 of Income.

Exhibit F—Continued

9.	Surrender values applied to purchase paid-up insurance and annuities (see Income No. 9)	0
10.	Dividends paid to policy-holders in cash or applied in liquidation of loans or notes	12,151,153.54
11.	Dividends applied to pay renewal premiums (see Income No. 14)	7,599,337.57
12.	Dividends applied to shorten the endowment or premium paying period (see Income No. 15)	27,343.00
13.	Dividends applied to purchase paid-up additions and annuities (see Income No. 8)	2,352,130.32
14.	Dividends left with the Company to accumulate at interest (see Income No. 22)	677,797.31
15.	(Total paid policy-holders $86,938,637.92)	
16.	Expense of investigation and settlement of policy claims, including $35,630.98 for legal expense	41,154.31
17.	Paid for claims on supplementary contracts not involving life contingencies	788,260.99
18.	Dividends and interest thereon held on deposit surrendered during the year	139,777.52
19.	Paid stockholders for interest or dividends	0
20.	Commissions to agents (less commission on reinsurance): First year's premiums, $5,895,171.53; renewal premiums, $2,191,025.61; annuities (original), $20,270.56; (renewal), $1,449.37	8,107,917.07

21.	Commuted renewal commissions		0
22.	Compensation of managers and agents not paid by commission for services in obtaining new insurance		30,765.81
23.	Agency supervision and traveling expenses of supervisors (except compensation for Home Office supervision)		1,008,601.78
24.	Branch Office expenses, including salaries of managers and clerks not included in item 22		1,191,861.80
25.	Medical examiners' fees, $488,194.01; inspection of risks, $126,242.38		614,436.39
26.	Salaries and all other compensation of officers, directors, trustees and Home Office employees		2,180,711.60
27.	Rent, including $284,813.48 for Company's occupancy of its own buildings, less $420.00 received under sublease		599,297.67
28.	Advertising, $32,966.24; printing and stationery, $286,517.14; postage, telegraph, telephone and express, $273,493.39; exchange, $ 0		592,976.77
29.	Legal expense not included in item 16		23,888.19
30.	Furniture, fixtures and safes		102,106.49
31.	Repairs and expenses (other than taxes) on real estate		480,063.72
32.	Taxes on real estate		292,995.71
33.	State taxes on premiums		1,045,980.14
34.	Insurance Department licenses and fees		24,599.23
35.	All other licenses, fees and taxes (give items and amounts):		
36.	Federal Corporation tax	$196,967.18	

EXHIBIT F—Continued

37.	Local licenses and taxes, $35,983.92; tax on policy reserves, $61,698.89	97,682.81	
38.	Miscellaneous taxes (including $73,251.13 tax on interest receipts)	159,516.96	
			454,166.95
39.	Other disbursements (give items and amounts):		
40.	Paid agents under Nylic contracts	916,775.82	
41.	Doubtful debts marked off $7,741.62; Fire Losses, $4,310.88; Income Tax, $6,107.62	18,160.12	
42.	Books, Papers and Subscriptions, $10,511.00; Special Inspection Reports, $6,277.83; Lunch for Company's employees, $110,573.37; Miscellaneous Items of Expense, $13,148.01; Legislative and Departmental Expenses, $6,435.88; Expenses Directors' Election, 1917, $237.90; Traveling Expenses, $9,566.64; Examination and Audits of the Company's accounts, $5,046.08; Examination by Insurance Department, State of New York, $9,014.43; Mortality Investigation, $4,596.72	175,407.86	
43.	Miscellaneous Interest Payments, $19,601.82; Bank Charges, $9,804.58; Custody of and Insurance		

	on Securities, $27,476.56; Premiums on Fidelity Bonds, $7,173.07; Real Estate Commissions and Fees, $24,000.00; Real Estate and Mortgage Department Expenses, $16,061.61; National Association of Owners of Railroad Securities, $8,380.78	112,498.42		
44.	Agents' balance charged off		1,222,842.22	
45.	Borrowed money repaid (gross)		0	
46.	Interest on borrowed money		0	
47.	Gross loss on sale or maturity of ledger assets, viz.:			
	(a) Real Estate, per Schedule A	0		
	(b) Bonds, per Schedule D	8,436.95		
	(c) Stocks, per Schedule D	0		
			8,436.95	
48.	Gross decrease, by adjustment, in book value of ledger assets, viz.:			
	(a) Real Estate, per Schedule A	498,528.34		
	(b) Bonds per Schedule D (including $309,490.70 for amortization of premiums)	3,385,603.27		
	(c) Stocks, per Schedule D	187,646.88		
	(d) Bond and Mortgage	322.81		
			4,072,101.30	
49.	Total Disbursements			$109,961,580.53
50.	Balance			$911,698,026.02

EXHIBIT F—Continued

[fol. 126] Annual Statement of the New York Life Insurance Company

IV.—Ledger Assets.

1.	Book value of Real Estate (less 0 incumbrances), per Schedule A		$15,888,000.00
2.	Mortgage Loans on Real Estate, per Schedule B, first liens, $166,687,476.31; other than first liens, $ 0		166,687,476.31
3.	Loans secured by pledge of bonds, stocks or other collateral per Schedule C		421,700.00
4.	Loans made to policy-holders on this Company's policies assigned as collateral		155,628,298.27
5.	Premium Notes on policies in force, of which $ 0 is for first year's premiums		4,481,373.01
6.	Book value of bonds, $552,408,471.10 and stocks, $107,025.00, per Schedule D		552,515,496.10
7.	Cash in Company's office	$5,080.64	
8.	Deposits in trust companies and banks not on interest, per Schedule E	1,839,840.60	
9.	Deposits in trust companies and banks, on interest, per Schedule E	13,721,421.73	
			15,566,342.97

10.	Bills receivable, $2,604.50; agent's' balances (debit, $ 0 , credit, $ 0); net, $ 0 ; Branch Office debit balances, $215,126.23; credit, $86,495.16; net, $128,631.07	131,235.57	
11.	Cash in Company's Branch Offices, $94,357.77; Cash in Transit, $282,133.62	376,491.39	
11½.	United States War Savings Certificates and United States Thrift Stamps	1,612.40	
12.	Total Ledger Assets, as per "balance" on page 3		$911,698,026.02
	Non-ledger Assets.		
13.	Interest due, $264,994.68 and accrued, $2,428,621.06 on Mortgages, per Schedule B	2,693,615.74	
14.	Interest due, $2,066,157.74 and accrued, $7,527,742.56 on Bonds, per Schedule D, part 1	9,593,900.30	
15.	Interest due, $ 0 and accrued, $1,301.06 on Collateral Loans, per Schedule C, Part 1	1,301.06	
16.	Interest due, $ 0 and accrued, $935,885.93 on Premium Notes, Policy Loans or Liens	935,885.93	
17.	Interest due, $ and accrued, $ on other Assets (give items and accounts):		
18.	Interest due, $53,512.00 and accrued, $71,231.00 on Bank Balances		
19.		124,743.00	

EXHIBIT F—Continued

20.	Rents due, $37,285.55 and accrued, $15,304.08 on Company's property or lease		52,589.63	
21.	Total interest and rents due and accrued			13,402,035.66
22.	Market value of Real Estate over book value, per Schedule A			0
23.	Market value (not including interest in item 14), of Bonds and Stocks over book value, per Schedule D			0
24.	Due from other companies for losses or claims on policies of the Company, reinsured			13,524.60
		(1) New Business	(2) Renewals	
25.	Gross premiums due and unreported on policies in force December 31, 1917 (less reinsurance premiums)	$145,596.75	$9,884,783.16	
26.	Gross deferred premiums on policies in force December 31, 1917 (less insurance premiums)	629,487.00	5,707,788.00	
27.	Totals	$775,083.75	$15,592,571.16	
28.	Deducted loading, 25%	193,770.94	3,898,142.79	
29.	Net amount of uncollected and deferred premiums	$581,312.81	$11,694,428.37	
				12,275,741.18
30.	All other Assets (give items and amounts):			

31.			
32.			
33.			
34.			
35.	Gross Assets		$937,389,327.46
	Deduct Assets not Admitted		
36.	Company's stock owned, $ 0 ; loans on, $ 0 ,	0	
37.	Supplies, stationery, printed matter, $ 0 , furniture, fixtures, and safes $ 0 ,	0	
38.	Commuted commissions, $ 0 ; agents' debit balances, gross, $ 0 ,	0	
39.	Cash advanced to or in the hands of officers or agents	0	
40.	Loans on personal security, endorsed or not, $ 0 ; bills receivable, $2,604.50	$2,604.50	
41.	Premium notes, policy loans and other policy assets in excess of net value and of other policy liabilities on individual policies	0	
42.	Overdue and accrued interest on Bonds in default	0	
43.	Market value of special deposits in excess of corresponding liabilities, per Special Deposit Schedule, Page 11	0	
44.	Book value of Ledger Assets over market value, viz., on Stocks and Bonds not subject to amortization	2,242,215.21	

EXHIBIT F—Continued

45.	Branch Office debit balances	215,126.23	
46.			2,459,945.94
47.	Total Admitted Assets		$934,929,381.52

F.

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V.—Liabilities, Surplus and Other Funds

Net present value of all the outstanding policies in force on the 31st day of December, 1917, as computed by the Insurance Department of the State of New York on the following tables of mortality and rates of interest, viz.:

1.	Actuaries' table at — per cent on*	0	
	Same for reversionary additions	0	
			0
2.	American Experience table at 3 per cent. on* all insurances except those specified under 4	$611,441,015.00	
	Same for reversionary additions	8,096,469.00	
			$619,537,484.00
3.	American Experience table at per cent. on*	0	
	Same for reversionary additions	0	
			0

4.	Other tables and rates, viz.:*		
	Double American Experience table at 3 per cent. on tropical insurances and those on impaired lives	41,858,269.00	
	Same for reversionary additions	199,446.00	
			42,057,715.00
	Sesqui American Experience table at 3 per cent. on semi-tropical insurances and those on partially impaired lives	51,759,150.00	
	Same for reversionary additions	183,978.00	
			51,943,128.00
5.	Net present value of annuities (including those in reduction of premiums). Give tables and rates of interest, viz.:		
	McClintock's Annuity table, 3 per cent.		15,033,396.00
	Total		728,571,723.00
6.	Deduct net value of risks of this Company reinsured in other solvent companies†		86,938.00
7.	Net Reserve (Paid-for basis)		$728,484,785.00

* State definitely the dates of issue and class of policies covered by each basis of valuation.

† The net value of risks reinsured in British Companies $905,280 is not included, as these companies are not doing business in the State of New York, See Schedule X

Exhibit F—Continued

8.	Extra reserve for total and permanent disability benefits $543,694.00; and for additional accidental death benefits $19,800.00, included in life policies		563,494.00
9.	Present value of amounts not yet due on supplementary contracts not involving life contingencies, computed by the Company		5,462,720.13
10.	Present value of amounts incurred but not yet due for total and permanent disability benefits		213,892.00
11.	Liability on policies canceled and not included in "net reserve" upon which a surrender value or reinstatement may be demanded		467,963.84
12.	Claims for Death-Losses due and unpaid	0	
13.	Claims for Death-Losses in process of adjustment, or adjusted and not due	2,044,692.47	
14.	Claims for Death-Losses reported for which no proofs have been received	3,824,403.72	
15.	Reserve for net Death-Losses incurred but unreported	1,500,000.00	
16.	Claims for Matured Endowments due and unpaid	2,154,520.48	
17.	Claims for Death-Losses and other Policy Claims resisted	594,289.88	
18.	Claims for total and permanent disability benefits $32,986.98; and for additional accidental death benefits $10,000, including $4,589.98 resisted	42,896.98	
19.	Due and unpaid on Annuity Claims involving life contingencies	189,515.14	
20.	Total Policy Claims		10,350,318.67

21.	Due and unpaid on supplementary contracts not involving life contingencies	13,849.75
22.	Dividends left with the Company to accumulate at interest and accrued interest thereon	2,180,726.52
23.	Premiums paid in advance, including surrender values so applied	1,093,413.43
24.	Unearned interest ($3,129,273.54) and rent ($7,607.38) paid in advance	3,136,880.92
25.	Commissions due to agents on premium notes when paid	24,091.55
26.	Commissions to agents, due or accrued	9,632.41
27.	"Cost of Collection" on uncollected and deferred premiums, in excess of the loading thereon	0
28.	Salaries, rents, office expenses, bills and accounts due or accrued (including $3,350.72 accrued charges on deposits)	177,424.46
29.	Medical Examiners' fees, $26,908.22; Inspectors' fees, $5,736.90; and legal fees, $4,719.96; due or accrued	37,365.08
30.	Estimated amount hereafter payable for Federal, State and other taxes based upon the business of the year of this statement (including $41,370.75 accrued taxes on Interest and Deposits)	1,957,353.36
31.	Advances by officers or others on account of expenses of organization or otherwise	0
32.	Borrowed money, $ 0 , and interest thereon, $ 0	0
33.	Unpaid dividends to stock-holders	0
34.	Dividends or other profits due policy-holders, including those contingent on payment of outstanding and deferred premiums	1,741,222.65
35.	Dividends declared on or apportioned to annual dividend policies payable to policy-holders to and including (month) December (day) 31st, 1918, whether contingent upon the payment of renewal premiums or otherwise	12,437,514.00

EXHIBIT F.—Continued

36.	Dividends declared on or apportioned to deferred dividend policies payable to policy-holders to and including (month) December (day) 31st, 1918	14,123,549.64
37.	Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 30	107,041,778.00
38.	Reserve, special or surplus funds not included above (give items and amounts separately, and state for what purpose each of said funds is held), Security Fluctuation and General Contingency fund, $38,154,807.36; Annual Dividend Equalization funds, $2,429,397.00	40,584,204.36
39.	Reserve for future expenses on Paid-up Annual Dividend policies	610,000.00
40.		
41.		
42.	All other liabilities (give items and amounts):	
43.	Due agents under Nylic contracts	1,315.81
44.	Reserve for Nylic contracts	3,869,029.00
45.	Income tax deducted at source, $160.94; reserve for unclaimed receipts, $25,-141.00	25,301.94
46.	Guarantee deposits on real estate and rents $219,055.00; Deposited on contracts for sale of real estate $102,500.00	321,555.00
47.	Capital Stock	0
48.	Unassigned funds (surplus)	0
49.	Total	$934,929,381.52

EXHIBIT G

Annual Statement of the New York Life Insurance Company

I.—Capital Stock

1. Amount of Capital paid up in cash	$ 0		
2. Amount of ledger Assets (as per balance), December 31, of previous year		$911,698,026.02	
3. —crease of Capital during the year		0	
4. Extended at			$911,698,026.02

II.—Income

5. First year's premiums on original policies without deduction for commissions or other expenses, less $ 0 for first year's reinsurance	$13,530,018.19	
6. Surrender values applied to pay first year's premiums	0	
7. First year's premium on original policies	$13,530,018.19	
8. Dividends applied to purchase paid-up additions and annuities	3,416,881.27	
9. Surrender values applied to purchase paid-up insurance and annuities	0	

EXHIBIT G—Continued

10.	Consideration for original annuities involving life contingencies	411,574.21	
11.	Consideration for supplementary contracts involving life contingencies	532,539.32	
12.	New premiums		$17,891,015.99
13.	Renewal premiums (in addition to items 14, 16 and 17) without deduction for commission or other expenses, less $54,156.93 for reinsurance on renewals [including $30,243.61 premiums waived for total and permanent disability]	$82,624,334.23	
14.	Dividends applied to pay renewal premiums	8,236,286.77	
15.	Dividends applied to shorten the endowment or premium paying period	155,177.00	
16.	Surrender values applied to pay renewal premiums	143,940.26	
17.	Renewal premiums for deferred annuities	54,616.89	
18.	Renewal premiums		91,214,355.15
19.	Extra premiums for total and permanent disability benefits [first year premiums, $297,700.00; Renewal premiums $560,968.00] $858,668.00; and for additional accidental death benefits [first year premiums $143,469.00; renewal premiums $31,287.00] $174,756.00 included in life policies		1,033,424.00
20.	Premium income		$110,138,795.14

20a. Premiums reported during year, on U. S. monthly difference lists, to War Risk Insurance Bureau in accordance with the Soldiers' and Sailors' Civil Relief Act		15,344.02
20b. Totals, items 5-20A inclusive		$110,154,139.16
21. (A) Consideration for supplementary contracts not involving life contingencies		1,421,544.16
22. Dividends left with the Company to accumulate at interest (including surrender values of reversionary additions left on deposit $55,284.94)		919,704.32
23. Ledger assets, other than premiums, received from other companies for assuming their risks		0
24. Gross interest on mortgage loans, per Schedule B, less $39,538.63 accrued interest on mortgages acquired during 1918	$8,655,053.76	
25. Gross interest on collateral loans, per Schedule C	19,902.68	
26. Gross interest on bonds and dividends on stocks, less $210,237.61, accrued interest on bonds acquired during 1918, per Schedule D	23,514,897.40	

(A) Including commuted value of instalments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of Disbursements.

EXHIBIT G—Continued

27. Gross interest on premium notes, policy loans or liens, including $ 0 interest received on bonds deposited with the Company under the Soldiers' and Sailors' Civil Relief Act	7,498.647.66		
28. Gross interest on deposits in trust companies and banks, per Schedule E	510,406.68		
29. Gross interest on other debts due the Company (give items and amounts):			
30. Agents' debts	82.70		
31.			
32. Gross discount on claims paid in advance	14,478.87		
33. Gross rent from Company's property, including $301,758.06 for Company's occupancy of its own buildings, per Schedule A	1,287,407.23		
34. Total gross interest and rents		41,500,876.98	
35. From other sources (give items and amounts):			
36. Commissions advanced imprevious years, now repaid $18,824.27; Policy Fees $3,290.48; Fire Insurance $5.35; Income Tax $316.88; Doubtful debts recovered $1,281.48; Bonuses received for prepayment or extension of Mortgage Loans $15,987.39		39,705.85	
37.			

38.			
39.			
40. From Agents balances previously charged off		0	
41. Borrowed money (gross)*		24,000,000.00	
42. Gross profit on sale or maturity of ledger assets, viz.:			
(a) Real estate, per Schedule A	$235,916.77		
(b) Bonds, per Schedule D	82,394.00		
(c) Stocks, per Schedule D	425.00		
		318,735.77	
43. Gross, by adjustment, in book value of ledger assets, viz.:			
(a) Real estate, per Schedule A	0		
(b) Bonds, per Schedule D (including $524,269.01 for accrual of discount)	$524,269.01		
(c) Stocks, per Schedule D	0		
(d) Bond and Mortgage	7,404.15		
		531,673.16	
44. Total Income			$178,886,379.40
45. Amount carried forward			$1,090,584,405.42

*Company is at liberty to briefly state transaction, so that explanation can be carried as a footnote in Department report.

*This amount was borrowed to increase Company's subscription to Fourth Liberty Loan.

EXHIBIT G—Continued

[fol. 129] 3

Amount brought forward			$1,090,584,405.42

III.—Disbursements

1. (A) For death claims (less $24,332.50 reinsurance), $34,144,975.86; additions, $866,181.75		$35,011,157.61	
2. (A) For matured endowments (less $14,599.50 reinsurance), $15,819,082.96; additions, $23,373.09		15,842,456.05	
3. (a) For total and permanent disability:			
Premiums waived during the year	$30,243.61		
Payments made to policy-holders during the year	32,593.32		
		62,836.93	
(b) For additional accidental death benefits		59,000.00	
4. Net amount paid for losses and matured endowments			$50,975,450.59
5. For annuities involving life contingencies			1,394,701.12
6. Premium notes and liens voided by lapse, less $ 0 restorations			0
7. Surrender values paid in cash or applied in liquidation of loans or notes			19,092,107.90
8. Surrender values applied to pay new premiums (see Income No. 6), $; to pay renewal premiums (see Income No. 16), $143,940.26			143,940.26

9. Surrender values applied to purchase paid-up insurance and annuities (see Income No. 9)	0
10. Dividends paid to policy-holders in cash or applied in liquidation of loans or notes	13,420,888.91
11. Dividends applied to pay renewal premiums (see Income No. 14)	8,236,286.77
12. Dividends applied to shorten the endowment or premium paying period (see Income No. 15)	155,177.00
13. Dividends applied to purchase paid-up additions and annuities (see Income No. 8)	3,416,884.27
14. Dividends left with the Company to accumulate at interest (see Income No. 22)	864,419.38
15. (Total paid policy-holders, $97,699,856.20)	
16. Expense of investigation and settlement of policy claims, including $41,818.44 for legal expense	48,817.92
17. Paid for claims on supplementary contracts not involving life contingencies	863,872.00
18. Dividends and interest thereon held on deposit surrendered during the year	282,385.18
19. Paid stockholders for interest or dividends	0
20. Commissions to agents (less commission on reinsurance): First year's premiums, $6,568,636.82; renewal premiums, $2,321,768.28; annuities (original), $14,075.02; (renewal), $1,973.55	8,906,453.67

(A) Including commuted value of supplementary contracts—see No. 21 of Income.

Exhibit G—Continued

21. Commuted renewal commissions	0
22. Compensation of managers and agents not paid by commission for services in obtaining new insurance	37,870.52
23. Agency supervision and traveling expenses of supervisors (except compensation for Home Office supervision)	1,084,335.20
24. Branch Office expenses, including salaries of managers and clerks not included in item 22	1,338,722.61
25. Medical examiners' fees, $462,107.11; inspection of risks, $117,123.22	579,230.33
26. Salaries and all other compensation of officers, directors, trustees and Home Office employees	2,378,583.03
27. Rent, including $301,758.06 for Company's occupancy of its own buildings, less $2,890.15 received under sublease	607,965.61
28. Advertising, $40,666.31; printing and stationery, $333,639.19; postage, telegraph, telephone and express, $305,836.01; exchange, $228,067.48	908,208.99
29. Legal expense not included in item 16	19,598.75
30. Furniture, fixtures and safes	69,628.27
31. Repairs and expenses (other than taxes) on real estate	454,737.46
32. Taxes on real estate	322,857.37
33. State taxes on premiums	1,127,789.94
34. Insurance Department licenses and fees	21,064.09
35. All other licenses, fees and taxes (give items and amounts):	

36.	Federal Corporation tax	$949,837.52	
37.	Local licenses and taxes, $50,917.92; tax on policy reserves $64,094.10	115,012.02	
38.	Miscellaneous taxes (including $39,414.38 tax on interest receipts)	41,616.93	
			1,106,466.47
39.	Other disbursements (give items and amounts):		
40.	Paid agents under Nylic contracts	$950,021.49	
41.	Doubtful debts marked off $7,477.81; Credit allowed for remittances sent and not received, $118.03; Remittances not yet adjusted, $667.77; Guaranteed Deposit now availed of, $2,500.00;	10,763.61	
42.	Books, Papers and Subscriptions, $11,071.64; Special Inspection Reports, $5,375.68; Lunch for Company's employees, $138,560.90; Miscellaneous Items of Expense, $13,789.87; Legislative and Departmental Expenses, $1,029.46; Traveling Expenses, $16,100.77; Examination and Audits of the Company's accounts, $4,857.26; Examination by Insurance Department, State of New York, $10,667.37; Transfer of Company's Records from Paris to Lyons, France, $22,589.91; Contributions to Red Cross and United War Work Compaign Funds, $100,000.00	324,042.86	

EXHIBIT G—Continued

43. Miscellaneous Interest Payments, $12,576.06; Bank Charges, $7,052.00; Custody of and Insurance on Securities, $13,979.66; Premiums on Fidelity Bonds, $6,366.00; Real Estate Commissions and Fees, $22,435.00; Real Estate and Mortgage Department Expenses, $8,484.49; National Association of Owners of Railroad Securities, $8,552.92	79,446.19	
		1,364,274.15
44 Agents' balance charged off		0
45. Borrowed money repaid (gross)		1,320,000.00
46. Interest on borrowed money		0
47. Gross loss on sale or maturity of ledger assets, viz.:		
(a) Real Estate, per Schedule A	0	
(b) Bonds, per Schedule D	$5,825.80	
(c) Stocks, per schedule D	0	
		5,825.80
48. Gross decrease, by adjustment, in book value of ledger assets, viz.:		
(a) Real Estate, per Schedule A	$734,361.65	
(b) Bonds per Schedule D (including $315,320.89 for amortization of premiums)	1,422,002.92	
(c) Stocks, per Schedule D	0	

	(d) Bond and Mortgage	299.47		
49.	Total Disbursements		2,156,664.04	$122,700,207.00
	Balance			$967,884,198.42

IV.—Ledger Assets

1.	Book value of Real Estate (less $ 0 incumbrances), per Schedule A	$13,449,600.00
2.	Mortgage Loans on Real Estate, per Schedule B, first liens, $166,053,804.71; other than first liens, $ 0	166,053,804.71
3.	Loans secured by pledge of bonds, stocks or other collateral per Schedule C	718,550.00
3A.	Premiums reported on U. S. monthly difference lists, to War Risk Insurance Bureau, in accordance with the Soldiers' and Sailors' Civil Relief Act	15,344.02
4.	Loans made to policy-holders on this Company's policies assigned as collateral	150,990,219.79
5.	Premium Notes on policies in force, of which $ 0 is for first year's premiums	4,124,582.57
6.	Book value of bonds, $610,798,650.92 and stocks, $99,375.00, per Schedule D	610,898,025.92

Exhibit G—Continued

7.	Cash in Company's office	$3,828.45	
8.	Deposits in trust companies and banks not on interest, per Schedule E	4,991,325.80	
9.	Deposits in trust companies and banks, on interest per Schedule E	15,295,680.63	
			20,290,834.88
10.	Bills receivable, $544.50; agents' balances (debit, $ 0 , credit, $ 0); net, $ 0 Branch Office debit balances, $368,806.03; credit, $326,446.92; net, $42,359.11		42,903.61
11.	Cash in Company's Branch Offices, $462,482.79; Cash in Transit, $815,709.42		1,278,192.21
11½	United States War Savings Certificates and United States Thrift Stamps		22,140.71
12.	Total Ledger Assets, per "balance" on page 3		$967,884,198.42

Non-Ledger Assets

13.	Interest due, $121,634.63 and accrued, $2,429,938.61 on Mortgages, per Schedule B	$2,551,573.24
14.	Interest due, $3,200,303.09 and accrued, $8,168,084.49 on Bonds, per Schedule D, Part 1	11,368,387.58
15.	Interest due, $ 0 and accrued, $6,580.99 on Collateral Loans, per Schedule C, part 1	6,580.99
16.	Interest due, $ 0 and accrued, $1,021,590.65 on Premium Notes, Policy Loan or Liens	1,021,590.65

17.	Interest due, $ and accrued, $ on other Assets (give items and amounts):			
18.	Interest due, $55,341.00 and accrued, $60,372.00 on Bank Balances		115,713.00	
19.				
20.	Rents due, $27,323.41 and accrued, $14,233.75 on Company's property or lease		41,557.16	
21.	Total interest and rents due and accrued			15,105,402.62
22.	Market value of Real Estate over book value, per Schedule A			0
23.	Market value (not including interest in item 14), of Bonds and Stocks over book value, per Schedule D			0
24.	Due from other companies for losses or claims on policies of this Company, reinsured			194,660.00
		(1) New Business.	(2) Renewals.	
25.	Gross premiums due and unreported on policies in force December 31, 1918 (less reinsurance premiums)	$127,786.34	$10,228,810.21	
26.	Gross deferred premiums on policies in force December 31, 1918 (less reinsurance premiums)	809,242.00	7,031,190.00	
27.	Totals	$937,028.34	$17,260,000.21	
28.	Deduct loading, 25%	234,257.09	4,315,000.05	
29.	Net amount of uncollected and deferred premiums	$702,771.25	$12,945,000.16	13,647,771.41

Exhibit G—Continued

30.	All other Assets (give items and amounts):		
31.	.....		
32.	.....		
33.	.....		
34.	.....		
35.	Gross Assets		$996,832,032.45
	Deduct Assets not Admitted		
36.	Company's stock owned, $ 0 ; loans on, $ 0 , ...	$0	
37.	Supplies, stationery, printed matter, $ 0 , furniture, fixtures, and safes $ 0	0	
38.	Commuted commissions, $ 0 ; agents' debit balances, gross, $ 0	0	
39.	Cash advanced to or in the hands of officers or agents	0	
40.	Loans on personal security, endorsed or not, $ 0 ; bills receivable, $544.50	544.50	
41.	Premium notes, policy loans and other policy assets in excess of net value and of other policy liabilities on individual policies..	0	
42.	Overdue and accrued interest on Bonds in default	0	
43.	Market value of special deposits in excess of corresponding liabilities, per Special Deposit Schedule, Page 11	0	
44.	Book value of Ledger Assets over market value, viz., on Stocks and Bonds not subject to amortization	1,180,737.06	

45.	Branch Office debit balances	368,806.03	
46.	Reinsurance due from Foreign Companies not transacting business in the State of New York	194,660.00	
		1,744,747.59	
47.	Total Admitted Assets		$995,087,284.86

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V.—Liabilities, Surplus and Other Funds

Net present value of all the outstanding policies in force on the 31st day of December, 1918, as computed by the Insurance Department of the State of New York on the following tables of mortality and rates of interest, viz:

1.	Actuaries' tables at per cent on*	0	
	Same for reversionary additions	0	
			0
2.	American Experience table at .. per cent on* all insurances except those specified under 4	$636,755,894.00	
	Same for reversionary additions	9,619,835.00	
			$646,375,729.00

* State definitely the dates of issue and class of policies covered by each basis of valuation.

EXHIBIT G—Continued

3. American Experience table at per cent on*	0		
Same for reversionary additions	0		
		0	
4. Other tables and rates; viz.:*			
Double American Experience table at 3 per cent on tropical insurances and on policies issued prior to 1907 on impaired lives	$41,093,493.00		
Same for reversionary additions	215,130.00		
		41,308,623.00	
Sesqui American Experience table at 3 per cent on semi-tropical insurances and on policies issued prior to 1907 on partially impaired lives	$52,414,459.00		
Same for reversionary additions	213,000.00		
		52,627,459.00	
5. Net present value of annuities (including those in reduction of premiums). Give tables and rates of interest, viz.:			
McClintock's Annuity table, 3 per cent		15,437,886.00	
Total		$755,749,697.00	
6. Deduct net value of risks of this Company reinsured in other solvent companies†		50,175.00	
7. Net Reserve (Paid-for basis)			$755,699,522.00

8.	Extra reserve for total and permanent disability benefits $891,473.00; and for additional accidental death benefits $104,857.00, included in life policies	.....	996,330.00
9.	Present value of amounts not yet due on supplementary contracts not involving life contingencies, computed by the Company	.....	6,234,168.45
10.	Present value of amounts incurred but not yet due for total and permanent disability benefits	.....	255,458.00
11.	Liability on policies canceled and not included in "net reserve" upon which a surrender value or reinstatement may be demanded.	.....	501,838.30
12.	Claims for Death-Losses due and unpaid	0	
13.	Claims for Death-Losses in process of adjustment, or adjusted and not due	3,770,298.70	
14.	Claims for Death-Losses reported for which no proofs have been received	7,412,184.51	
15.	Reserve for net Death-Losses incurred but unreported	1,500,000.00	
16.	Claims for Matured Endowments due and unpaid	3,833,802.82	
17.	Claims for Death-Losses and other Policy Claims resisted	570,589.19	
18.	Claims for total and permanent disability benefits $114,317.32; and for additional accidental death benefits $27,500.00 including $1,605.98 resisted	141,817.32	

* State definitely the dates of issue and class of policies covered by each basis of valuation.

† The net value of risks reinsured in British Companies $742,847 is not included, as these companies are not doing business in the State of New York, See Schedule X.

EXHIBIT G—Continued

19.	Due and unpaid on Annuity Claims involving life contingencies	218,508.06	
20.	Total Policy Claims		17,447,200.00
21.	Due and unpaid on supplementary contracts not involving life contingencies		20,086.95
22.	Dividends left with the Company to accumulate at interest and accrued interest thereon		2,930,750.00
23.	Premiums paid in advance, including surrender values so applied		1,557,701.74
24.	Unearned interest ($2,947,730.98) and rent ($10,100.37 paid in advance		2,957,831.35
25.	Commissions due to agents on premium notes when paid		3,739.82
26.	Commissions to agents, due or accrued		10,685.08
27.	"Cost of Collection" on uncollected and deferred premiums, in excess of the loading thereon		0
28.	Salaries, rents, office expenses, bills and accounts due or accrued (including $2,266.83 accrued charges on deposits)		207,500.00
29.	Medical Examiners' fees, $37,696.53; Inspector's fees, $6,472.16; and legal fees, $5,527.82; due or accrued		49,696.51
30.	Estimated amount hereafter payable for Federal, State and other taxes based upon the business of the year of this statement (including $27,737.77 accrued taxes on Interest on Bonds)		3,282,492.42
31.	Advances by officers or others on account of expenses of organization or otherwise.		0
32.	Borrowed money, $22,680,000.00, and accrued interest thereon, $183,879.44		22,863,879.44
33.	Unpaid dividends to stockholders		0
34.	Dividends or other profits due policy-holders, including those contingent on payment of outstanding and deferred premiums		2,181,647.26

35.	Dividends declared on or apportioned to annual dividend policies payable to policy-holders to and including (month) December (day) 31st, 1919, whether contingent upon the payment of renewal premiums or otherwise	13,636,876.00
36.	Dividends declared on or apportioned to deferred dividend policies payable to policy-holders to and including (month) December (day) 31st, 1919	19,000,738.00
37.	Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36	100,893,328.00
38.	Reserve, special or surplus funds not included above (give items and amounts separately, and state for what purpose each of said funds is held), Security Fluctuation and General Contingency fund, $36,330,383.43; Annual Dividend Equalization funds, $2,449,545.00	38,779,928.43
39.	Reserve for future expenses on Paid-up Annual Dividend policies	730,000.00
40.		
41.		
42.	All other liabilities (give items and amounts):	
43.	Due agents under Nylic contracts	2,599.24
44.	Reserve for Nylic contracts	4,499,281.00
45.	Income tax deducted at source, $477.82; reserve for unclaimed receipts, $24,473.23	24,951.05
46.	Guarantee deposits on real estate and rents $219,055.00; Deposited on contracts for sale of real estate $100,000.00	319,055.00
47.	Capital stock	0
48.	Unassigned funds (surplus)	0.
49.	Total	$995,087,284.86

EXHIBIT H

[fol. 132] 2 Annual Statement of the New York Life Insurance Company

I.—Capital Stock

1.	Amount of Capital paid up	$ 0		
2.	Amount of ledger Assets (as per balance), December 31, of previous year		$967,884,198 42	
3.	—crease of Capital during the year		0	
3½	Amount of Ledger Assets taken over by the Russian Soviet Government		33,187,609 14	
4.	Extended at			$934,696,589.28

II.—Income

5.	First year's premiums on original policies without deduction for commissions or other expenses, less $ 0 for first year's reinsurance	$20,555,051 43	
6.	Surrender values applied to pay first year's premiums	0	
7.	First year's premiums on original policies	$20,555,051 43	

8.	Dividends applied to purchase paid-up additions and annuities	3,303,267.76	
9.	Surrender values applied to purchase paid-up insurance and annuities	0	
10.	Consideration for original annuities involving life contingencies	412,678.89	
11.	Consideration for supplementary contracts involving life contingencies	639,677.83	
12.	New premiums		$24,910,675.91
13.	Renewal premiums (in addition to items 14, 16 and 17) without deduction for commissions or other expenses, less $55,624.44 for reinsurance on renewals [including $39,748.42 premiums waived for total and permanent disability]	$88,573,220.92	
14.	Dividends applied to pay renewal premiums	8,811,162.83	
15.	Dividends applied to shorten the endowment or premium paying period	183,142.00	
16.	Surrender values applied to pay renewal premiums	219,458.46	
17.	Renewal premiums for deferred annuities	62,394.90	
18.	Renewal premiums		97,849,279.11
19.	Extra premiums for total and permanent disability benefits [first year premiums, $511,163.00; Renewal premiums $834,651.00] $1,345,-		

	814.00; and for additional accidental death benefits [first year premiums $397,164.00; renewal premiums $211,363.00] $608,527.00 included in life policies		1,954,341 00
20.	Premium income		$124,714,296 02
20A.	Premiums reported during year, on U. S. monthly difference lists, to War Risk Insurance Bureau in accordance with the Soldiers' and Sailors' Civil Relief Act		15,179 42
20B.	Totals, items 5-20A inclusive		$124,729,475 44
21.	(A) Consideration for supplementary contracts not involving life contingencies		1,099,635 21
22.	Dividends left with the Company to accumulate at interest (including surrender values of reversionary additions left on deposit $47,543.85)		997,201 54
23.	Ledger assets, other than premiums, received from other companies for assuming their risks		0
24.	Gross interest on mortgage loans, less $32,239.09 accrued interest on mortgages acquired during 1919	$8,427,497 10	

25.	Gross interest on collateral loans, per Schedule C	31,586.07	
26.	Gross interest on bonds and dividends on stocks, less $423,618.88, accrued interest on bonds acquired during 1919, per Schedule D	25,485,665.65	
27.	Gross interest on premium notes, policy loans or liens, including $680.75 interest received on bonds deposited with the Company under the Soldiers' and Sailors' Civil Relief Act	7,418,912.29	
28.	Gross interest on deposits in trust companies and banks, per Schedule E	606,049.60	
29.	Gross interest on other debts due the Company (give items and amounts):		
30.	Agents' debts	20.92	
31.			
32.	Gross discount on claims paid in advance	11,113.86	
33.	Gross rent from Company's property, including $289,695.28 for Company's occupancy of its own buildings, less $ 0 interest on incumbrances, per Schedule A	1,245,850.34	
34.	Total interest and rents		43,226,695.83

(A) Including commuted value of instalments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of Disbursements.

EXHIBIT H—Continued

35.	From other sources (give items and amounts):		
36.	Commissions advanced in previous years now repaid $56,850.32; Policy Fees $2,859.69; Fire Insurance $133.65; Federal Income Tax $897.94; Doubtful debts recovered $2,456.46; Bonuses received for prepayment or extension of Mortgage Loans $17,682.39; Remittances not yet adjusted $25,813.21		106,693.66
37.	Sale of Law-library, Kansas City		3,500.00
38.	Exchange		677,476.56
39.	Amount deposited on contract of sale of Real Estate, forfeiture of which is claimed by the Company		750.00
40.	From Agents' balances previously charged off		0
41.	Borrowed money (gross)*		4,700,000.00
42.	Gross profit on sale or maturity of ledger assets viz:		
	(a) Real estate, per Schedule A	$1,264,601.00	
	(b) Bonds, per Schedule D	31,961.73	
	(c) Stocks, per Schedule D	0	
			1,296,562.73

43.	Gross increase, by adjustment, in book value of ledger assets.:			
	(a) Real estate, per Schedule A	$71,665.82		
	(b) Bonds, per Schedule D (including $340,-210.73 for accrual of discount)	340,210.73		
	(c) Stocks, per Schedule D	0		
	(d) Bond and Mortgage	6,454.60		
			418,331.15	
44.	Total Income			$177,256,322.12
45.	Amount carried forward			$1,111,952,911.40
[fol. 133]				3
	Amount brought forward			$1,111,952,911.40

III.—Disbursements

1.	(A) For death claims (less $51,773.31 reinsurance), $37,477,433.36; additions, $871,575.77	$38,349,009.13	
2.	(A) For matured endowments (less $ 0 reinsurance), $21,963,115.44; additions, $48,718.87	22,011,834.31	

(A) Including commuted value of supplementary contracts—see No. 21 of Income.

*Company is at liberty to briefly state transaction, so that explanation can be carried as a footnote in Department report.

*This amount was borrowed to increase Company's subscription to Liberty Victory Loan.

Exhibit H—Continued

3. (a) For total and permanent disability:			
Premiums waived during the year	$39,748.42		
Payments made to policy-holders during the year	44,143.32	83,891.74	
(b) For additional accidental death benefits		182,473.55	
4. Net amount paid for losses and matured endowments			$60,627,208.73
5. For annuities involving life contingencies			1,477,700.34
6. Premium notes and liens voided by lapse, less $ 0 restorations			0
7. Surrender values paid in cash or applied in liquidation of loans or notes			22,151,566.08
8. Surrender values applied to pay new premiums (see Income No. 6), $ 0 ; to pay renewal premiums (see Income No. 16), $219,458.46			219,458.46
9. Surrender values applied to purchase paid-up insurance and annuities (see Income No. 9)			0
10. Dividends paid to policy-holders in cash or applied in liquidation of loans or notes			18,451,457.61
11. Dividends applied to pay renewal premiums (see Income No. 14)			8,811,162.83

12.	Dividends applied to shorten the endowment or premium paying period (see Income No. 15)	183,142 00
13.	Dividends applied to purchase paid-up additions and annuities (see Income No. 8)	3,303,267 76
14.	Dividends left with the Company to accumulate at interest (see Income No. 22)	949,657 69
15.	(Total paid policy-holders $116,174,621.50)	
16.	Expense of investigation and settlement of policy claims, including $37,955.92 for legal expense	42,284 66
17.	Paid for claims on supplementary contracts not involving life contingencies	1,036,655 76
18.	Dividends and interest thereon held on deposit surrendered during the year	390,354 82
19.	Paid stockholders for dividends (amount declared during the year, $ 0 ; stock, $ 0	0
20.	Commissions to agents (less commission on reinsurance): First year's premiums, $10,166,799.40; renewal premiums, $2,583,086.67; annuities (original), $13,555.66; (renewal), $2,034.32	12,765,476 05
21.	Commuted renewal commissions	0
22.	Compensation of managers and agents not paid by commission for services in obtaining new insurance	187,272 30
23.	Agency supervision and traveling expenses of supervisors (except compensation for Home Office supervision)	1,078,486 54

EXHIBIT H—Continued

24.	Branch Office expenses, including salaries of managers and clerks not included in item 22		1,758,241.35
25.	Medical examiners' fees, $721,311.05; inspection of risks, $165,517.89		886,828.94
26.	Salaries and all other compensation of officers, directors, trustees and Home Office employees		2,691,731.40
27.	Rent, including $289,695.28 for Company's occupancy of its own buildings, less $5,058.67 received under sublease		608,366.32
28.	Advertising, $52,445.87; printing and stationery, $303,398.90; postage, telegraph, telephone and express, $300,114.05. Exchange $0		655,958.82
29.	Legal expense not included in item 16		18,199.07
30.	Furniture, fixtures and safes		168,512.86
31.	Repairs and expenses (other than taxes) on real estate		407,107.35
32.	Taxes on real estate		298,848.60
33.	State taxes on premiums		1,278,534.57
34.	Insurance Department licenses and fees		30,376.36
35.	Federal Taxes		697,359.98
36.	All other licenses, fees and taxes (give items and amounts):		
37.	Local licenses and taxes, $34,726.31; tax on policy reserves, $66,863.99	$101,590.30	
38.	Miscellaneous taxes (including $22,412.70 tax on interest receipts)	395,427.81	
39.			497,018.11

40.	Other disbursements (give items and amounts):		
41.	Paid agents under Nylic contracts	$995,354 42	
42.	Doubtful debts marked off $5,930.92; Guaranteed Deposit now available of, $219,055.00	224,985 92	
43.	Books, Papers and Subscriptions, $17,062.71; Special Inspection Reports, $5,889.96; Lunch for Company's employees, $177,159.57; Miscellaneous Items of Expense, $15,570.76; Legislative and Departmental Expenses, $3,013.96; Traveling Expenses, $16,504.32; Examination and Audits of the Company's accounts, $4,828.21; Expenses Directors election, 1919, $367.45; Foodstuffs sent to European Department Employees, $4,300.00	244,696.94	
44.	Miscellaneous Interest Payments, $80,546.37; Bank Charges, $8,123.87; Custody of and Insurance on Securities, $17,178.74; Premiums on Fidelity Bonds, $6,591.10; Real Estate Commissions and Fees, $40,300.00; Real Estate and Mortgage Department Expenses, $9,273.18; National Association of Owners of Railroad Securities, $8,516.27	170,529 53	
			1,635,566 81

Exhibit H—Continued

45.	Agents' balances charged off		0	
46.	Borrowed money repaid (gross)		27,380,000.00	
47.	Interest on borrowed money		599,950.51	
48.	Gross loss on sale or maturity of ledger assets, viz.:			
	(a) Real Estate, per Schedule A	0		
	(b) Bonds, per Schedule D	$32,214.87		
	(c) Stocks, per Schedule D	0		
			32,214.87	
49.	Gross decrease, by adjustment, in book value of ledger assets, viz:			
	(a) Real Estate, per Schedule A	$4,776.20		
	(b) Bonds per Schedule D (including $330,004.89 for amortization of premiums)	4,118,009.14		
	(c) Stocks, per Schedule D	0		
	(d) Bond and Mortgage	199.61		
			4,122,984.95	
50.	Total Disbursements			$175,442,962.50
51.	Balance			$936,509,948.90

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IV.—Ledger Assets

1.	Book value of Real Estate (less $ 0 incumbrances) per Schedule A		$9,070,481.00
2.	Mortgage Loans on Real Estate, per Schedule B, first liens, $159,869,677.31; other than first liens, $ 0		159,869,677.31
3.	Loans secured by pledge of bonds, stocks or other collateral per Schedule C		159,000.00
3A.	Premiums reported on U. S. monthly difference lists, to War Risk Insurance Bureau, in accordance with the Soldiers' and Sailors' Civil Relief Act		30,523.44
4.	Loans made to policy-holders on this Company's policies assigned as collateral		141,006,021.32
5.	Premium Notes on policies in force, of which $ 0 is for first year's premiums		4,179,913.45
6.	Book value of bonds, $601,349,888.64 and stocks, $99,375.00, per Schedule D		601,449,263.64
7.	Cash in Company's office	$6,214.82	
8.	Deposits in trust companies and banks not on interest, per Schedule E	2,117,768.99	
9.	Deposits in trust companies and banks, on interest, per Schedule E	17,922,024.22	
			20,046,008.03

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EXHIBIT H—Continued

10.	Bills receivable, $544.50; agents' balances (debit, $ 0 , credit, $ 0); net, $ 0 Branch Office debit balances, $242,981.60; credit $188,382.41; net, $54,599.19	55,143.69	
11.	Cash in Company's Branch Offices, $71,741.28; Cash in Transit, $572,175.74	643,917.02	
12.	Total Ledger Assets, as per "balance" on page 3		$936,509,948.90
	Non-ledger Assets		
13.	Interest due, $111,193.41 and accrued, $2,361,075.85, on Mortgages	$2,472,269.26	
14.	Interest due, $306,516.65 and accrued, $7,929,611.05 on Bonds, per Schedule D, Part 1	8,236,127.70	
15.	Interest due, $ 0 and accrued, $1,290.99 on Collateral Loans, per Schedule C, part 1	1,290.99	
16.	Interest due, $ 0 and accrued, $1,012,585.45 on Premium Notes, Policy Loans or Liens	1,012,585.45	
17.	Interest due, $ and accrued, $ on other Assets (give items and amounts):		
18.	Interest due, $60,507.82 and accrued, $57,388.46 on Bank Balances	117,896.28	
19.			
20.	Rents due, $7,968.82 and accrued, $1,251.38 on Company's property or lease	9,220.20	
21.	Total interest and rents due and accrued		11,849,389.88
22.	Market value of Real Estate over book value, per Schedule A		0

23.	Market value (not including interest in item 14), of Bonds and Stocks over book value, per Schedule D			0
24.	Due from other companies for losses or claims on policies of this Company, reinsured			55,964.75
		(1) New Business	(2) Renewals	
25.	Gross premiums due and unreported on policies in force December 31, 1919 (less reinsuranee premiums)	$194,672.38	$9,503,065.56	
26.	Gross deferred premiums on policies in force December 31, 1919 (less reinsurance premiums)	1,398,715.00	7,561,351.00	
27.	Totals	$1,593,387.38	$17,064,416.56	
28.	Deduct loading, 25%	398,346.84	4,266,104.14	
29.	Net amount of uncollected and deferred premiums	$1,195,040.54	$12,798,312.42	13,993,352.96
31.				
32.				
33.				
34.				
35.	Gross Assets			$962,408,656.49

EXHIBIT H—Continued

Deduct Assets not Admitted

36.	Company's stock owned, $ 0 ; loans on, $ 0 ,	$0	
37.	Supplies, stationery, printed matter, $ 0 , furniture, fixtures, and safes $ 0 ,	0	
38.	Commuted commissions, $ 0 ; agents' debit balances, gross, $ 0 ,	0	
39.	Cash advanced to or in the hands of officers or agents	0	
40.	Loans on personal security, endorsed or not, $ 0 ; bills receivable, $544.50	$544.50	
41.	Premium notes, policy loans and other policy assets in excess of net value and of other policy liabilities on individual policies	0	
42.	Overdue and accrued interest on Bonds in default	0	
43.	Market value of special deposits in excess of corresponding liabilities, per Special Deposit Schedule, Page 10	0	
44.	Book value of real estate over market value	0	
45.	Book value of bonds and stocks over market value, viz.: on Bonds and Stocks not subject to amortization	1,087,045.59	
46.	Book value of other Ledger Assets over market value, viz.:	0	
46A.	Branch Office debit balances	242,981.60	
46B.	Reinsurance due from Foreign Companies not transacting business in the State of New York	55,964.75	
			1,386,536.44
47.	Total Admitted Assets		$961,022,120.05

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Net present value of all the outstanding policies in force on the 31st day of December, 1919, as computed by the Insurance Department of the State of New York on the following tables of mortality and rates of interest, viz.:			
1. Actuaries' table at per cent. on*	0		
Same for revisionary additions	0		
			0
2. American Experience table at 3 per cent. on* all insurances except those specified under 4	$638,848,396.00		
Same for reversionary additions	11,213,416.00		
			$650,061,812.00
3. American Experience table at per cent. on*	0		
Same for reversionary additions	0		
			0
4. Other tables and rates, viz.:*			
Double American Experience table at 3 per cent. on tropical insurances and on policies issued prior to 1907 on impaired lives	$36,999,388.00		

* State definitely the dates of issue and class of policies covered by each basis of valuation.

EXHIBIT H—Continued

Same for reversionary additions	230,805.00		
		37,230,193.00	
Sesqui American Experience table at 3 per cent. on semi-tropical insurances and on policies issued prior to 1907 on partially impaired lives	$51,971,888.00		
Same for reversionary additions	247,950.00		
		52,219,838.00	
5. Net present value of annuities (including those in reduction of premiums). Give tables and rates of interest, viz.:			
McClintock's Annuity table, 3 per cent		15,800,070.00	
Total		$755,311,913.00	
6. Deduct net value of risks of this Company reinsured in other solvent companies†		50,650.00	
7. Net Reserve (Paid-for basis)‡			$755,261,263.00
8. Extra reserve for total and permanent disability benefits $1,474,603.00; and for additional accidental death benefits $362,436.00, included in life policies			1,837,039.00
9. Present value of amounts not yet due on supplementary contracts not involving life contingencies, computed by the Company			6,429,929.62

10.	Present value of amounts incurred but not yet due for total and permanent disability benefits	.....	457,876.00
11.	Liability on policies canceled and not included in "net reserve" upon which a surrender value or reinstatement may be demanded	.....	429,565.37
12.	Claims for Death-Losses due and unpaid	0	
13.	Claims for Death-Losses in process of adjustment, or adjusted and not due	2,092,431.89	
14.	Claims for Death-Losses reported for which no proofs have been received	4,041,111.52	
15.	Reserve for net Death-Losses incurred but unreported	2,000,000.00	
16.	Claims for Matured Endowments due and unpaid	2,275,029.93	
17.	Claims for Death-Losses and other Policy Claims resisted	461,088.58	
18.	Claims for total and permanent disability benefits $98,818.00; and for additional accidental death benefits $6,000.00 including $3,250.00 resisted	104,818.00	
19.	Due and unpaid on Annuity Claims involving life contingencies	189,098.62	
20.	Total Policy Claims		11,163,578.54
21.	Due and unpaid on supplementary contracts not involving life contingencies		2,348.24
22.	Dividends left with the Company to accumulate at interest and accrued interest thereon		3,730,750.00

† The net value of risks reinsured in British Companies $815,799 is not included, as these companies are not doing business in the State of New York, See Schedule X.

‡ The Rusian business taken over by the Soviet Government has been excluded.

EXHIBIT H—Continued

23.	Premiums paid in advance, including surrender values so applied	1,659,764.04
24.	Unearned interest ($2,692,713.65) and rent ($7,646.99) paid in advance	2,700,360.64
25.	Commissions due to agents on premium notes when paid	544.73
26.	Commissions to agents, due or accrued	12,347.68
27.	"Cost of Collection" on uncollected and deferred premiums, in excess of the loading thereon	0
28.	Salaries, rents, office expenses, bills and accounts due or accrued (including $2,857.49 accrued charges on deposits)	140,116.43
29.	Medical Examiners' fees, $44,426.63; Inspectors' fees, $8,359.43; and legal fees $7,344.18; due or accrued	60,130.24
30.	Estimated amount hereafter payable for Federal, State and other taxes based upon the business of the year of this statement (including $9,558.60 accrued taxes on Interest on Bonds)	4,673,095.56
31.	Advances by officers or others on account of expenses of organization or otherwise	0
32.	Borrowed money, 0, and interest thereon, 0	0
33.	Unpaid dividends to stockholders	0
34.	Dividends or other profits due policy-holders, including those contingent on payment of outstanding and deferred premiums	2,184,285.75
35.	Dividends declared on or apportioned to annual dividend policies payable to policy-holders to and including (month) December (day) 31st, 1920, whether contingent upon the payment of renewal premiums or otherwise	13,850,878.00
36.	Dividends declared on or apportioned to deferred dividend policies payable to policy-holders to and including (month) December (day) 31st, 1920	18,194,897.56

37.	Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36	88,157,964.00
38.	Reserve, special or surplus funds not included above (give items and amounts separately, and state for what purpose each of said funds is held), Security Fluctuation and General Contingency Fund, $41,493,640.91; Annual Dividend Equalization funds, $2,404,327.00	43,897,967.91
39.	Reserve for future expenses on Paid-up Annual Dividend policies	820,000.00
40.		
41.		
42.	All other liabilities (give items and amounts):	
43.	Due agents under Nylic contracts	3,200.54
44.	Reserve for Nylic contracts	5,201,805.00
45.	Income tax deducted at source, $1,375.76; Reserve for unclaimed receipts, $50,286.44	51,662.20
46.	Guarantee deposits on real estate and rents $750.00; Deposited on contracts for sale of real estate $100,000.00	100,750.00
47.	Capital paid up	0
48.	Unassigned funds (surplus)	0
49.	Total	$961,022,120.05

I.—Capital Stock

1.	Amount of Capital paid up	$0	
2.	Amount of ledger Assets (as per balance), December 31, of previous year	$936,509,948.90	
3.	— crease of Capital during the year	0	
4.	Extended at		$936,509,948.90

II.—Income

5.	First year's premiums on original policies without deduction for commissions or other expenses, less $149,329.61 for first year's reinsurance	$26,039,700.04	
6.	(a) First year's premiums for Total and Permanent Disability Benefits, less $0 for first year's reinsurance	676,181.00	
	(b) For additional Accidental Death Benefits included in life policies, less $0 for first year's reinsurance	539,100.00	
7.	Surrender values applied to pay first year's premiums	0	
8.	First year's premiums on original policies	$27,254,981.04	

9.	Dividends applied to purchase paid-up additions and annuities	3,056,882.40	
10.	Surrender values applied to purchase paid-up insurance and annuities	0	
11.	Consideration for original annuities involving life contingencies	138,146.80	
12.	New premiums		$30,450,010.24
13.	Renewal premiums (in addition to items 15, 17 and 18) without deduction for commissions or other expenses, less $68,789.30 for reinsurance on renewals [including $55,672.42 premiums waived for total and permanent disability]	$101,114,539.87	
14.	(a) Renewal premiums for Total and Permanent Disability Benefits, less $0 for reinsurance on renewals	1,326,077.00	
	(b) For additional Accidental Death Benefits included in life policies, less $0 for reinsurance on renewals	609,513.00	
15.	Dividends applied to pay renewal premiums	8,588,904.29	
16.	Dividends applied to shorten the endowment or premium paying period	208,914.00	
17.	Surrender values applied to pay renewal premiums.	295,266.09	
18.	Renewal premiums for deferred annuities	79,019.83	
19.	Renewal premiums		112,222,234.08
20.	Premium income		$142,672,244.32

EXHIBIT I—Continued

20a.	Premiums reported during year, on U. S. monthly difference lists, to War Risk Insurance Bureau in accordance with the Soldiers' and Sailors' Civil Relief Act		0
20b.	Total, items 5-20A inclusive		$142,672,244.32
21	Consideration for supplementary contracts involving life contingencies		490,476.65
22.	(A) Consideration for supplementary contracts not involving life contingencies		1,434,723.32
23.	Dividends left with the Company to accumulate at interest (including reversionary additions surrendered for cash, $1,054,614.40, left on deposit		2,825,186.44
24.	Ledger assets, other than premiums, received from other companies for assuming their risks		0
25.	Gross interest on mortgage loans, less $17,044.02 accrued interest on mortgages acquired during 1920	8,391,481.00	
26.	Gross interest on collateral loans, per Schedule C	158,660.53	
27.	Gross interest on bonds and dividends on stock, less $454,025.46, accrued interest on bonds acquired during 1920, per Schedule D	26,363,073.66	

28.	Gross interest on premium notes, policy loans or liens, including $1,141.00 interest received on bonds deposited with the Company under the Soldiers' and Sailors' Civil Relief Act	7,621,408.73	
29.	Gross interest on deposits in trust companies and banks, per Schedule E	749,365.54	
30.	Gross interest on other debts due the Company (give items and amounts)		
31.			
32.			
33.	Gross discount on claims paid in advance	9,703.33	
34.	Gross rent from Company's property, including $339,555.77 for Company's occupancy of its own buildings, less $0 interest on incumbrances, per Schedule A	1,041,311.24	
35.	Total interest and rents		44,335,004.03
36.	From other sources (give items and amounts):		
37.	Commissions advanced in previous years now repaid $15,908.88; Policy Fees $2,711.23; Federal Income Tax $680.49; New York State Income		

(A) Including commuted value of instalments or other benefits not payable at the time of death or maturity of endowments, such commuted value being entered also under No. 1 or 2 of Disbursements.

EXHIBIT I—Continued

	Tax $2,295.77; Doubtful debts recovered $1,-987.01; Bonuses received for prepayment or extension of Mortgage Loans $18,306.28; Refund Expense Mortality Investigation $798.00	$42,687.66	
38.	Exchange $1,199,943.34; Remittances not yet adjusted, $59,972.33	1,259,915.67	
39.	Part payment, Sale Law Library, Kansas City	3,388.50	
40.	Policy Loans reinstated, $40,273.78; Branch Office balances reinstated, $39,405.36	79,679.14	
			1,385,670.97
41.	From Agents' balances previously charged off		0
42.	Borrowed money (gross)*		0
43.	Gross profit on sale or maturity of ledger assets, viz.:		
	(a) Real estate, per Schedule A	$67,364.41	
	(b) Bonds, per Schedule D	33,355.92	
	(c) Stocks, per Schedule D	0	
			100,720.33
44.	Gross increase, by adjustment, in book value of ledger assets, viz.:		
	(a) Real estate, per Schedule A	0	
	(b) Bonds, per Schedule D (including $532,752.30 for accrual of discount)	532,752.30	

	(c) Stocks, per Schedule D (received under reorganization)	5,116.00		
	(d) Bond and Mortgage	8,238.76		
			546,107.06	
45.	Total Income			$193,790,133.12
46.	Amount carried forward			$1,130,300,082.02

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Amount brought forward, ... $1,130,300,082.02

III.—Disbursements

1.	(A) For death claims (less $59,466.00 reinsurance), $34,240,568.20; additions, $795,989.64	$35,036,557.84
2.	(A) For matured endowments (less $8,857.03 reinsurance), $23,737,032.68; additions, $106,900.03	23,843,932.71
3.	(a) For total and permanent disability: Premiums waived during the year (less $ 0 reinsurance)	$55,672.42

*Company is at liberty to briefly state transaction, so that explanation can be carried as a footnote in Department report.

(A) Including commuted value of supplementary contracts—see No. 22 of Income.

EXHIBIT I—Continued

	Payments made to policy-holders during the year (less $ 0 reinsurance)	82,265.67	137,938.09
	(b) For additional accidental death benefits (less $ 0 reinsurance)		417,200.83
4.	Net amount paid for losses and matured endments		$59,435,629.47
5.	For annuities involving life contingencies		1,400,300.34
6.	Premium notes and liens voided by lapses, less $ 0 restorations		0
7.	Surrender values paid in cash or applied in liquidation of loans or notes		21,736,845.97
8.	Surrender values applied to pay new premiums (see Income No. 7), $ 0 ; to pay renewal premiums (see Income No. 17), $295,266.09		295,266.09
9.	Surrender values applied to purchase paid-up insurance and annuities (see Income No. 10)		0
10.	Dividends paid to policy-holders in cash or applied in liquidation of loans or notes		18,356,282.70
11.	Dividends applied to pay renewal premiums (see Income No. 15)		8,588,904.29
12.	Dividends applied to shorten the endowment or premium paying period (see Income No. 16)		208,914.00
13.	Dividends applied to purchase paid-up additions and annuities (see Income No. 9)		3,056,882.40

14.	Dividends left with the Company to accumulate at interest (see Income No. 23)	1,770,572.04
	(Total paid policy-holders $114,849,597.30)	
16.	Expense of investigation and settlement of policy claims, including $55,316.65 for legal expense	66,136.34
17.	Paid for claims on supplementary contracts not involving life contingencies	1,283,365.48
18.	Dividends and interest thereon held on deposit surrendered during the year	549,409.15
19.	Paid stockholders for dividends (amount declared during the year, cash $ 0 ; stock, $ 0	0
20.	Commissions to agents (less commission on reinsurance): First year's premiums, $13,208,083.76; renewal premiums, $3,628,088.04; annuities (original), $9,123.31; (renewal), $2,119.37	16,847,414.48
21.	Commuted renewal commissions	0
22.	Compensation of managers and agents not paid by commission for services in obtaining new insurance	26,038.44
23.	Agency supervision and traveling expenses of supervisors (except compensation for Home Office supervision)	1,160,196.44
24.	Branch Office expenses, including salaries of managers and clerks not included in item 22	2,162,255.53
25.	Medical examiners' fees, $867,709.27; inspection of risks, $218,053.34	1,085,762.61
26.	Salaries and all other compensation of officers, directors, trustees and Home Office employees	3,406,596.15

EXHIBIT I—Continued

27.	Rent, including $339,555.77 for Company's occupancy of its own buildings, less $8,683.70 received under sublease		746,709.60
28.	Advertising, $69,837.86; printing and stationery, $572,942.46; postage, telegraph, telephone and express $307,236.45; exchange $ 0		950,016.77
29.	Legal expense not included in item 16		19,335.06
30.	Furniture, fixtures and safes		276,260.06
31.	Repairs and expenses (other than taxes) on real estate		394,795.93
32.	Taxes on real estate		201,380.58
33.	State taxes on premiums		1,684,262.06
34.	Insurance Department licenses and fees		29,490.22
35.	Federal Taxes		2,028,434.87
36.	All other licenses, fees and taxes (give items and amounts):		
37.	Local licenses and taxes, $60,160.97; tax on policy reserves, $64,580.89	$124,741.86	
38.	Miscellaneous taxes (including $16,868.06 tax on interest receipts)	64,664.33	
			189,406.19
39.	Other disbursements (give items and amounts):		
40.	Paid agents under Nylic contracts	$1,082,319.48	
41.	Doubtful debts marked off	17,622.92	
42.	Books, Papers and Subscriptions, $16,009.65; Special Inspection Reports, $4,486.62; Lunch for Com-		

	pany's employees, $204,444.47; Miscellaneous Items of Expense, $27,371.19; Legislative and Departmental Expenses $4,754.05; Traveling Expenses, $24,482.15; Examination and Audits of the Company's accounts, $6,418.58; Foodstuffs sent to European Department Employees, $8,977.30; Examination by New York State Insurance Department, $10,878.13; Association of Life Insurance Presidents, $13,569.96	321,392.10	
43.	Miscellaneous Interest Payments, $70,949.05; Bank Charges, $12,593.77; Custody of and Insurance on Securities, $19,798.78; Premiums on Fidelity Bonds, $8,049.90; Real Estate Commissions and Fees, $8,972.50; Real Estate and Mortgage Department Expenses, $13,084.73; National Association of Owners of Railroad Securities, $17,033.82	150,482.55	
			1,571,817.05
43½	Adjustment arising from the adoption of a lower standard for conversion of Foreign Currencies*		37,502,693.44
44.	Agents' balances charged off		0
45.	Borrowed money repaid (gross)		0

*This item is not a disbursement but is necessary because in 1920 the Company adopted a lower standard for conversion of certain foreign currencies, resulting in a decrease in dollars in its Foreign Assets and correspondingly in its Foreign Liabilities.

EXHIBIT I—Continued

46.	Interest on borrowed money		0	
47.	Gross loss on sale or maturity of ledger assets, viz.:			
	(a) Real Estate, per Schedule A	0		
	(b) Bonds, per Schedule D	$967,576.12		
	(c) Stocks, per schedule D	0		
			967,576.12	
48.	Gross decrease, adjustment, in book value of ledger, viz.:			
	(a) Real Estate, per Schedule A	0		
	(b) Bonds per Schedule D (including $301,839.88 for amortization of premiums)	2,946,863.94		
	(c) Stocks, per Schedule D	25,580.53		
	(d) Bond and Mortgage	183.64		
			2,972,628.11	
49.	Total Disbursements			$190,971,577.98
50.	Balance			$939,328,504.04

[fol. 138] 4 Annual Statement of the New York Life Insurance Company

IV.—Ledger Assets

1.	Book value of Real Estate (less $ 0 incumbrances) per Schedule A		$8,407,481.00

2.	Mortgage Loans on Real Estate, per Schedule B, first liens, $164,796,225.60; other than first liens, $ 0		164,796,225.60
3.	Loans secured by pledge of bonds, stocks or other collateral per Schedule C		6,565,500.00
3A.	Premiums reported on U. S. monthly difference lists, to War Risk Insurance Bureau, in accordance with the Soldiers' and Sailors' Civil Relief Act		1,186.72
4.	Loans made to policy-holders on this Company's policies assigned as collateral		142,803,763.89
5.	Premium Notes on policies in force, of which $ 0 is for first year's premiums		4,605,483.18
6.	Book value of bonds, $600,881,854.55 and stocks, $104,146.00, per Schedule D		600,986,000.55
7.	Cash in Company's office	$3,109.28	
8.	Deposits in trust companies and banks not on interest, per Schedule E	1,836,273.72	
9.	Deposits in trust companies and banks, on interest, per Schedule E	8,153,482.33	
			9,992,865.33
10.	Bills receivable, $544.50; agents' balances (debit, $ 0 , credit, $ 0); net, $ 0 Branch Office debit balances, $98,115.56; credit, $479,326.48; net, $18,789.08		19,333.58
11.	Cash in Company's Branch Offices, $76,805.58; Cash in Transit, $983,858.61		1,060,664.19
12.	Total Ledger Assets, as per "balance" on page 3		$939,328,504.04

Exhibit I—Continued

Non-ledger Assets

13.	Interest due, $91,598.05 and accrued, $2,478,115.38, on Mortgages	2,569,713.43	
14.	Interest due, $343,206.02 and accrued, $7,830,400.07 on Bonds, per Schedule D, Part 1	8,173,606.09	
15.	Interest due, $ 0 and accrued, $35,281.18 on Collateral Loans, per Schedule C, part 1	35,281.18	
16.	Interest due, $ 0 and accrued, $1,218,182.51 on Premium Notes, Policy Loans or Liens	1,218,182.51	
17.	Interest due, $ and accrued, $ on other Assets (give items and amounts:		
18.	Interest due, $59,884.00 and accrued, $22,369.53 on Bank Balances	82,253.53	
19.			
20.	Rents due, $8,561.51 and accrued, $ 0 on Company's property or lease	8,561.51	
21.	Total interest and rents due and accrued		12,087,598.25
22.	Market value of Real Estate over book value, per Schedule A		0
23.	Market value (not including interest in item 14), of Bonds and Stocks over book value, per Schedule D, viz.: Bonds and Stocks not subject to amortization		1,985,244.72
24.	Due from other companies for losses or claims on policies of this Company, reinsured		98,665.00

		(1) New Business (Paid for Basis)	(2) Renewals	
25.	Gross premiums due and unreported on policies in force December 31, 1920 (less reinsurance premiums)	$293,026.98	$7,939,785.35	
26.	Gross deferred premiums on policies in force December 31, 1920 (less reinsurance premiums)	1,748,813.00	8,300,655.00	
27.	Total	$2,041,839.98	$16,240,440.35	
28.	Deduct loading, 25%	510,460.00	4,060,110.09	
29.	Net amount of uncollected and deferred premiums	$1,531,379.98	$12,180,330.26	13,711,710.24
30.	All other Assets (give items and amounts):			
31.				
32.				
33.				
34.				
35.	Gross Assets			$967,211,722.25
	Deduct Assets not Admitted			
36.	Company's stock owned, $ 0 ; loans on, $ 0		$0	
37.	Supplies, stationery, printed matter, $ 0 , furniture, fixtures, and safes $ 0		0	

Exhibit I—Continued

38.	Commuted commissions, $ 0 ; agents' debit balances, gross, $ 0		0	
39.	Cash advanced to or in the hands of officers or agents		0	
40.	Loans on personal security, endorsed or not, $ 0 ; bills receivable, $544.50		544.50	
41.	Premium notes, policy loans and other policy assets in excess of net value and of other policy liabilities on individual policies		0	
42.	Overdue and accrued interest on Bonds in default		0	
43.	Book value of real estate over market value	$0		
44.	Book value of bonds and stocks over market value, viz.: Bonds and Stocks not subject to amortization	0		
45.	Book value of other Ledger Assets over market value, viz.:	0		
			0	
45A.	Branch Office debit balances		498,115.56	
45B.	Reinsurance due from Foreign Companies not transacting business in the State of New York		48,665.00	
				547,325.06
46.	Total Admitted Assets			$966,664,397.19

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Net present value of all the outstanding policies in force on the 31st day of December, 1920, as computed by the Insurance Department of the State of New York on the following tables of mortality and rates of interest, viz.:			
1. Actuaries' table at per cent. on*	0		
Same for dividend additions	0		
			0
2. American Experience table at 3 per cent. on* all insurance except those specified under 4	$678,382,115.00		
Same for dividend additions	10,977,490.00		
			$689,359,605.00
3. American Experience table at per cent. on*	0		
Same for dividend additions	0		
			0
4. Other tables and rates, viz.:*			
Double American Experience table at 3 per cent. on policies issued prior to 1907 on impaired lives	$34,071,089.00		
Same for dividend additions	208,093.00		
			34,279,182.00

* State definitely the dates of issue and class of policies covered by each basis of valuation.

EXHIBIT I—Continued

Sesqui American Experience table at 3 per cent. on semi-tropical insurances and on policies issued prior to 1907 on partially impaired lives	$51,281,869.00		
Same for dividend additions	244,108.00		
		51,525,977.00	
5. Net present value of annuities (including those in reduction of premiums). Give tables and rates of interest, viz.:			
McClintock's Annuity table, 3 per cent		15,613,711.00	
Total		$790,778,475.00	
6. Deduct net value of risks of this Company reinsured in other solvent companies†	$96,391.00		
6½. Adjustment arising from the adoption of a lower standard for conversion of Foreign Currencies	34,691,224.00		
7. Net Reserve (Paid-for basis)		34,787,615.00	
			$755,990,860.00
8. Extra reserve for total and permanent disability benefits $2,286,592.00; and for additional accidental death benefits $740,312.00, included in life policies			3,026,904.00
9. Present value of amounts not yet due on supplementary contracts not involving life contingencies, computed by the Company			6,763,008.59

10.	Present value of amounts incurred but not yet due for total and permanent disability benefits		863,934.00
11.	Liability on policies canceled and not included in "net reserve" upon which a surrender value or reinstatement may be demanded		517,943.70
12.	Claims for Death-Losses due and unpaid	$0	
13.	Claims for Death-Losses in process of adjustment, or adjusted and not due	2,008,709.35	
14.	Claims for Death-Losses reported for which no proofs have been received	3,546,669.27	
15.	Reserve for net Death-Losses incurred but unreported	2,250,000.00	
16.	Claims for Matured Endowments due and unpaid	1,512,594.56	
17.	Claims for Death-Losses and other Policy Claims resisted	392,937.82	
18.	Claims for total and permanent disability benefits $208,499.00; and for additional accidental death benefits, $64,000.00, including $10,500.00 resisted	272,499.00	
19.	Due and unpaid on Annuity Claims involving life contingencies	136,077.14	
20.	Total Policy Claims		10,119,487.14
21.	Due and unpaid on supplementary contracts not involving life contingencies		946.74
22.	Dividends left with the Company to accumulate at interest and accrued interest thereon		6,247,821.30
23.	Premiums paid in advance, including surrender values so applied		1,662,778.06
24.	Unearned interest ($2,570,283.89) and rent ($258.08) paid in advance		2,570,541.97

† The net value of risks reinsured in British and Canadian Companies $959,620 is not included, as these companies are not doing business in the State of New York, See Schedule X.

Exhibit I—Continued

25.	Commissions due to agents on premium notes when paid	2,004.09
26.	Commissions to agents, due or accrued	14,107.06
27.	"Cost of Collection" on uncollected and deferred premiums, in excess of the loading thereon	0
28.	Salaries, rents, office expenses, bills and accounts due or accrued (including $1,957.24 accrued charges on deposits)	174,486.38
29.	Medical Examiners' fees, $51,296.54; Inspectors' fees, $41.00; and legal fees, $5,409.31; due or accrued	56,746.85
30.	Estimated amount payable for Federal, State and other taxes based upon the business of the year of this statement (including $19,294.42 accrued taxes on Interest on Bonds)	6,917,026.34
31.	Advances by officers or others on account of expenses of organization or otherwise	0
32.	Borrowed money, $ 0, and interest thereon, $ 0	0
33.	Unpaid dividends to stockholders	0
34.	Dividends or other profits due policy-holders, including those contingent on payment of outstanding and deferred premiums	2,039,587.30
35.	Dividends declared on or apportioned to annual dividend policies payable to policy-holders to and including (month) December (day) 31st, 1921, whether contingent upon the payment of renewal premiums or otherwise	16,431,339.00
36.	Dividends declared on or apportioned to deferred dividend policies payable to policy-holders to and including (month) December (day) 31st, 1921	21,015,315.87

37.	Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36	76,176,646.00
38.	Reserve, special or surplus funds not included above (give items and amounts separately, and state for what purpose each of said funds is held), Security Fluctuation and General Contingency fund, $47,262,456.96; Annual Dividend Equalization funds, $1,969,937.00	49,232,393.96
39.	Reserve for future expenses on Paid-up Annual Dividend policies	870,000.00
40.		
41.		
42.	All other liabilities (give items and amounts):	
43.	Due agents under Nylic contracts	1,433.15
44.	Reserve for Nylic contracts	5,753,193.00
45.	Federal and New York State Income tax deducted at source, $4,352.02; Reserve for unclaimed receipts, $110,790.67	115,142.69
46.	Guarantee deposits on real estate and rents $750.00; Deposited on contracts for sale of real estate $100,000.00	100,750.00
47.	Capital paid up	0
48.	Unassigned funds (surplus)	0
49.	Total	$966,664,397.19

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[fol. 140] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER SETTLING BILL OF EXCEPTIONS

It is stipulated that the foregoing bill of exceptions contains all the facts and all the evidence introduced or offered upon the trial of said cause, and may be settled and ordered to be filed and annexed to the judgment roll herein.

James H. McIntosh, Attorney for Plaintiff.
Charles H. Tuttle, United States District Attorney, Attorney for Defendant.

New York, July 1, 1929.

And now, in furtherance of justice and that right may be done, said plaintiff tenders and presents the foregoing agreed statement of facts as a bill of exceptions, and prays that the same may be settled, allowed, signed and sealed by the Court and made a part of the record in said cause; and forasmuch as said bill of exceptions contains all the facts and all the evidence introduced or offered upon the trial of said cause, the same is settled, signed, sealed and allowed by me accordingly and ordered to be made a part of the record in said cause, this 1st day of July, 1929.

Julian W. Mack, Judge.

[fol. 141] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Now comes New York Life Insurance Company, plaintiff herein, and says that on the 27th day of June, 1929, this Court entered a judgment herein dismissing the First, Second and Third Causes of Action, respectively, in the plaintiff's complaint, and that by said judgment certain errors were committed to the prejudice of this plaintiff, all of which will more fully appear from the Assignment of Errors which is filed with this petition.

Wherefore, this plaintiff prays an appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit for the corrections of the errors so com-

plained of, and for allowance of said appeal and leave to prosecute the same, and a reversal of said judgment, and that a transcript of the record of the proceedings and pa-
[fol. 142] pers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

James H. McIntosh, Attorney for Plaintiff, Office and P. O. Address, 120 Broadway, New York City, N. Y.

Dated, New York, June 27th, 1929.

In United States District Court

[Title omitted]

Notice of Appeal

To the above named Defendant:

You will please take notice that New York Life Insurance Company, the plaintiff herein, hereby appeals to the United
[fol. 143] States Circuit Court of Appeals for the Second Circuit from so much of the judgment of the United States District Court for the Southern District of New York made herein on the 27th day of June, 1929, as dismisses the plaintiff's complaint with respect to its First, Second and Third Causes of Action, and on said day entered and docketed in the office of the Clerk of said United States District Court in favor of the defendant and against the plaintiff with respect to said First, Second and Third Causes of action.

James H. McIntosh, Attorney for Plaintiff, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York, N. Y.

Dated, New York, June 27th, 1929.

[fol. 144] In United States District Court

[Title omitted]

Assignment of Errors

Now comes the plaintiff, New York Life Insurance Company, by James H. McIntosh, its Attorney, and says that

in the record and proceedings in the above entitled cause there is manifest error which occurred at the trial of said cause, upon which it will rely in its prosecution of its appeal in the above entitled cause in this, to wit:

First: The Court erred in finding and adjudging that that plaintiff was liable for the payment of a capital stock tax for the year ending June 30, 1919.

Second: The Court erred in not deducting from the market value as of December 31, 1917, of the plaintiff's total admitted assets such deposits or reserve funds as the plain-[fol. 145] tiff was required by contract to hold for apportionment among and payment to its policyholders, to wit, the sum of $107,041,778.

Third: The Court erred in not deducting from the market value as of December 31, 1917, of the plaintiff's total admitted assets the dividends declared on deferred dividend policies and payable absolutely, to wit, the sum of $14,123,549.64.

Fourth: The Court erred in not deducting from the market value as of December 31, 1917, of the plaintiff's total admitted assets the dividends declared on annual dividend policies and payable absolutely, to wit, the sum of $12,437,514.

Fifth: The Court erred in not finding and adjudging that the plaintiff was entitled to refund of the entire capital stock tax paid by it for the period ending June 30, 1919.

Sixth: The Court erred in dismissing the plaintiff's complaint as to its First Cause of Action and in adjudging that the plaintiff was not entitled to the refund of any sum on account of said capital stock tax paid for the year ending June 30, 1919.

Seventh: The Court erred in finding and adjudging that the plaintiff was liable for the payment of a capital stock tax for the year ending June 30, 1920.

Eighth: The Court erred in not deducting from the market value as of December 31, 1918, of the plaintiff's total [fol. 146] admitted assets such deposits or reserve funds as the plaintiff was required by contract to hold for apportionment among and payment to its policyholders, to wit, the sum of $100,893,328.

Ninth: The Court erred in not deducting from the market value as of December 31, 1918, of the plaintiff's total admitted assets the dividends declared on deferred dividend policies and payable absolutely, to wit, the sum of $19,000,738.13.

Tenth: The Court erred in not deducting from the market value as of December 31, 1918, of the plaintiff's total admitted assets the dividends declared on annual dividend policies and payable absolutely, to wit, the sum of $13,636,876.

Eleventh: The Court erred in not finding and adjudging that the plaintiff was entitled to refund of the entire capital stock tax paid by it for the period ending June 30, 1920.

Twelfth: The Court erred in dismissing the plaintiff's complaint as to its Second Cause of Action and in adjudging that the plaintiff was not entitled to the refund of any sum on account of said capital stock tax paid for the year ending June 30, 1920.

Thirteenth: The Court erred in finding and adjudging that the plaintiff was liable for the payment of a capital stock tax for the year ending June 30, 1921.

[fol. 147] Fourteenth: The Court erred in not deducting from the market value as of December 31, 1919, of the plaintiff's total admitted assets such deposits or reserve funds as the plaintiff was required by contract to hold for apportionment among and payment to its policyholders, to wit, the sum of $88,157,964.

Fifteenth: The Court erred in not deducting from the market value as of December 31, 1919, of the plaintiff's total admitted assets the dividends declared on deferred dividend policies and payable absolutely, to wit, the sum of $18,194,897.56.

Sixteenth: The Court erred in not deducting from the market value as of December 31, 1919, of the plaintiff's total admitted assets the dividends declared on annual dividend policies and payable absolutely, to wit, the sum of $13,850,878.

Seventeenth: The Court erred in not finding and adjudging that the plaintiff was entitled to refund of the entire capital stock tax paid by it for the period ending June 30, 1921.

Eighteenth: The Court erred in dismissing the plaintiff's complaint as to its Third Cause of Action and in adjudging that the plaintiff was not entitled to the refund of any sum on account of said capital stock tax paid for the year ending June 30, 1921.

Wherefore the plaintiff prays that so much of said judgment of the United States District Court for the Southern [fol. 148] District of New York as dismisses the plaintiff's complaint with respect to its First, Second and Third Causes of Action and each of them for the errors aforesaid and for other errors in the record and proceedings herein may be reversed and held for naught, and that said plaintiff may be restored to all things which it has lost by reason of said judgment with respect of its said First, Second and Third Causes of Action.

James H. McIntosh, Attorney for Plaintiff, Office and P. O. Address, 120 Broadway, New York City, N. Y.

Dated, New York, June 27, 1929.

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—June 27, 1929

A judgment dismissing the plaintiff's complaint with respect to the plaintiff's First, Second and Third Causes of Action having been entered in the office of the clerk of this court on the 27th day of June, 1929, and the plaintiff having appealed from this judgment to the United States Circuit Court of Appeals for the Second Circuit, it is

[fol. 150] Ordered that said appeal be and the same is hereby allowed, and that execution and all proceedings to enforce said judgment be stayed pending the hearing and

determination of said appeal and the coming down to this court of the mandate of the United States Circuit Court of Appeals for the Second Circuit upon the filing by the plaintiff of a cost and supersedeas bond for the sum of Two Hundred and Fifty Dollars ($250) approved by a judge of this court.

Julian W. Mack, U. S. C. J.

Such bond conditioned as required by law filed by the plaintiff July 1, 1929; and approved by Circuit Judge Mack but not printed herein.

[fol. 151] Citation in usual form showing service on Charles H. Tuttle omitted in printing.

[fol. 152] In United States District Court

[Title omitted]

Stipulation re Transcript

It is hereby stipulated and agreed, that the foregoing is a true copy of the record, bill of exceptions, and all proceedings in the above entitled cause as agreed on by the parties.

James H. McIntosh, Attorney for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

Dated, July —, 1929.

[fol. 153] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 154] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, Plaintiff-Appellee,

against

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York, Defendant-Appellant

STATEMENT RE CROSS APPEAL

This is a cross appeal on behalf of the defendant-appellant, the plaintiff-appellant having taken an appeal on June 27, 1929, Calendar No. 129. This suit was commenced April 28, 1923. The names of the original parties were New York Life Insurance Company, plaintiff, and Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, defendant, and no change has taken place in the parties. The plaintiff's complaint was filed April 28, 1923, and the defendant's answer was filed January 14, 1924. Trial was had June 2, 1928, before the Hon. Julian W. Mack, Circuit Judge, without a jury, jury having been waived in writing. No question was referred to a Commissioner, Master or Referee. The Court decided the case May 28, 1929, and final judgment was entered June 27, 1929, and the appeal on behalf of the defendant was taken September 23, 1929.

[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION AND ORDER ALLOWING APPEAL

Now comes the defendant, Frank K. Bowers, Collector of Internal Revenue, and says that on the 27th day of June, 1929, the Court entered judgment herein against him upon the alleged fourth cause of action in plaintiff's complaint, and that by said judgment certain errors were committed to the prejudice of this plaintiff, all of which will more fully appear from the assignments of error filed with this petition.

Wherefore the defendant prays an appeal from said judgment to the Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, and for the allowance of said appeal and leave to prosecute the same and a reversal of said judgment insofar as it directs judgment against him, and that a transcript of record of the proceedings and papers in this cause duly authenticated be forwarded to said Circuit Court of Ap-
[fol. 156] peals.

Charles H. Tuttle, United States Attorney, Southern District of New York, Office and P. O. Address, U. S. Courts and Old P. O. Building, Borough of Manhattan, City of New York.

Dated, New York, N. Y., September 23, 1929.

The above appeal as prayed for is hereby allowed.
Woolsey, United States District Judge.

[fol. 157] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the defendant by Charles H. Tuttle, United States Attorney, his attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error which occurred at the trial of said cause upon which he will rely in the prosecution of his appeal in the above-entitled cause in this, to wit:

First. The Court erred in failing to dismiss the alleged Fourth cause of action set forth in plaintiff's complaint.

Second. The Court erred in granting judgment in favor of the plaintiff against the defendant upon said alleged Fourth cause of action.

Third. The Court erred in failing to dismiss the complaint in its entirety.

Fourth. The Court erred in directing judgment against the defendant in the sum of $94,134.00.

[fol. 158] Wherefore defendant prays that so much of said judgment as fails to dismiss the plaintiff's complaint with respect to its alleged Fourth cause of action; and grants judgment against the defendant upon the said alleged Fourth cause of action, may be reversed and held for naught and that said defendant may be restored to all things which he has lost by reason of said judgment.

Charles H. Tuttle, United States Attorney for the Southern District of New York, Office and P. O. Address: U. S. Courts and Old P. O. Bldg., Borough of Manhattan, City of New York.

Dated, New York, N. Y., September 23, 1929.

[fol. 159] In United States District Court

[Title omitted]

Order as to Bill of Exceptions—Filed July 12, 1929

Upon reading and filing the annexed consent and on motion of Charles H. Tuttle, United States Attorney for the Southern District of New York, attorney for the defendant, it is

Ordered that the bill of exceptions filed herein on the 1st day of July, 1929, be deemed as filed on behalf of both plaintiff and defendant.

J. W. Mack, U. S. C. J.

Dated, New York, July 11th, 1929.

Consented to without further notice.

James H. McIntosh, Attorney for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

Dated, New York, July 11, 1929.

[fol. 160] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER RE PRINTING RECORD ON CROSS-APPEAL

The plaintiff-appellant herein having caused the record on appeal to be filed in this Court which record contains all pleadings, papers, bill of exceptions and exhibits necessary on the argument of said appeal, and the defendant having taken a cross appeal upon the same pleadings, papers, bill of exceptions and exhibits, now upon the annexed consent and on motion of Charles H. Tuttle, United States Attorney for the defendant, it is

Ordered that the defendant-appellant be and he hereby is permitted to exclude from his said record on appeal all pleadings, papers, bill of exceptions and exhibits included in the record on appeal filed by the plaintiff-appellant herein.

[fol. 161] Manton, U. S. C. J.

Dated, October 8th, 1929.

The entry of the above order is hereby consented to.

James H. McIntosh, Atty. for Plaintiff.

Dated, Oct. 3, 1929.

[fol. 162] Citation in usual form omitted in printing.

[fol. 163] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

James H. McIntosh, Attorney for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

Dated, October 16th, 1929.

[fol. 164] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 165] In United States Circuit Court of Appeals, Second Circuit

New York Life Insurance Company, Appellant and Appellee,

against

Frank K. Bowers, Collector of Internal Revenue for the Second District of the State of New York, Appellee and Appellant

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Appeal by both parties from a judgment for the plaintiff of the District Court for the Southern District of New York in an action at law to recover back capital stock taxes paid by the plaintiff during the years ending June 30, 1919, 1920, 1921, 1922. The case was tried to the court upon an agreed statement of facts.

James H. McIntosh for the plaintiff
Samuel C. Coleman for the defendant.

Opinion

L. Hand, Circuit Judge:

The plaintiff is a large mutual life insurance company with its principal place of business in New York. In common with other such institutions it had before 1906 issued policies in consideration of equal yearly premiums, the accumulated dividends from which it retained for a fixed period, and divided among those who survived and had kept their policies alive when the period expired. These are semi-Tontine policies. Besides these it did the [fol. 166] ordinary business of life insurance under which also the insured paid equal yearly premiums, in consideration of a payment should he die within a given period, or a sum at the end of the period if he survived; or merely of a payment whenever he did die. Upon such policies the insured receives a dividend in the year following the payment of each premium. To provide against contingencies all premiums are computed at more than the estimated

cost of the insurance, and at the end of each year there is a remainder, called a "dividend", to which under his contract the insured is entitled, either absolutely, or, in the case of semi-Tontine policies, contingently upon his survival. In calculating the cost of insurance the insurer not only includes the actual losses which occur during the year, but "reserves", determined on an actuarial basis and universally required by statute. These are to accumulate sufficient sums to pay future losses, and thus to keep the class for any year actuarially solvent as a whole. Besides these, the necessary expenses of the business must be paid.

The tax in question was levied by virtue of § 1000 (c) of the Revenue Act of 1918, which provided that in the case of mutual companies it should be based upon "the sum of its surplus and contingent reserves maintained for the general use of the business, and any reserves the net additions to which are included under the provisions of Title II, as of the close of the preceding accounting period, used by such company for the purpose of making its income tax return.". During the years in question in its returns made to the New York superintendent of insur- [fol. 167] ance, the plaintiff carried three items, numbered thirty-five, thirty-six and thirty-seven respectively, which are the subject of this action. The first was designated "Dividends declared on, or apportioned to, annual dividend policies payable to policy holders to and including December 31," (of the following year) "whether contingent upon the payment of renewal premiums or otherwise." This was the amount to be declared by the plaintiff, as the remainder or profit upon those premiums received during the past year upon insurance other than semi-Tontine, after paying any losses in that year, setting aside the necessary "reserves", and deducting the proper share of the expenses.

Item thirty-six read as follows, "Dividends declared on, or apportioned to, deferred dividend policies payable to policy holders to and including December 31," of the following year. This represented the accumulation of all dividends throughout the existence of such policies, including the year in question, which would be paid in the following year upon the semi-Tontine policies which fell due in that year. Item thirty-seven was like item thirty-

six, exeept that it represented the accumulated dividends throughout their existence of all semi-Tontine policies which would fall due at some time later than the following year. In the case of all such dividends they were declared by resolution of the plaintiff's board of directors during the month of January in the following year.

In estimating the tax in question the Commissioner included all of Items thirty-five, thirty-six and thirty-seven for each current year, and this is the source of the plain- [fol. 168] tiff's complaint. It contends that the phrase, "surplus and contingent reserves maintained for the general use of the business", includes only those sums, the result of the general operation of the business, which have accumulated above legal reserves and declared dividends. The district court held that, as the dividends were not set apart, but remained in the plaintiff's business for all purposes, the items were "maintained for the general purposes of the business", and that they were part of "the surplus and contingent reserves."

In the case of ordinary stock companies the statute, (§ 1000 (a) (1).), levied a tax upon the value of the capital stock of the corporation, including its surplus and undivided profits, and this would ordinarily be reached merely by subtracting the liabilities from the assets. To insurance companies of any sort this was inappropriate. During the earlier years of a group of coeval policies the premiums are not enough to answer the payments, treated as absolute, though future, liabilities; it is only as the policies mature that the accumulated premiums become large enough to answer the later payments. It was therefore necessary to adopt some other rule. The law of 1916 taxed only stock insurance companies, and excluded from capital "such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of, or payment to, or apportionment among, policy holders." It apparently presupposed that policies were not liabilities, though it did not say so. In other respects the capital was [fol. 169] to be calculated like that of an ordinary business stock company. A question might arise whether "dividends", annual or deferred, were included within this exemption, but we have not that before us, except indirectly, because in 1918, while section 1000 (b) was retained, Congress by section 1000 (c) expressly provided for mutual

companies. In these, though all the policy holders are collectively a debtor to each one, all are also members of the company, and therefore collective owners of any profits which it may make. While it is true that each policy provides for the declaration of those profits in the form of dividends, it is rather as a charter,—also a contract,—provides for the declaration of dividends to shareholders in a stock company. The policy holders are therefore at once associates in the business of life insurance, as to which they are investors, and creditors of the group as a whole, (Penn State Mutual Ins. Co. v. Lederer, 252 U. S. 523).

When Congress in 1918 undertook to supply the casus omissus left in 1916, it defined the amount to be taxed as a "sum" of two factors, (§ 1000 (c)). The first was the "surplus and contingent reserves maintained for the general use of the business"; the second, those "reserves the net additions to which" were included in the income tax of the company. We agree that "dividends", whether annual or accumulated, should not be classed as "reserves", a word which has an accepted meaning in insurance, and which covers primarily those funds required by law, though [fol. 170] in some cases added funds required by contract. Therefore the items in suit are not included within the second factor of the "sum" to be taxed. We think that they are part of the surplus, and our reasons are that they are more nearly profits than the other sums which the section included. It expressly taxed "contingent reserves", that is, limited funds accumulated at the option of the insurer out of abundant caution, (e. g., § 37 of the N. Y. Insurance Law). These are withdrawn from what would otherwise be declared as dividends; they are funds temporarily at any rate taken out of profits and devoted to the insurer's contract obligations. Also it taxed those "reserves", stricti juris, whose net additions entered into the income tax. Section 234 (10) allowed insurance companies to deduct from their gross income the "net additions required by law to be made * * * to reserve funds." Additions to all other "reserves" were taxed as income, though they were such in the most limited sense. The second factor of the "sum" defined in § 1000 (c) thus comprehended any "reserves" required by contract as contrasted with those "required by law."

It appears to us incredible that Congress should have meant to exempt dividends which are taxable as income and to include both "contingent reserves" and those other reserves which we have just considered. The general pur-
[fol. 171] pose appears to have been to make the test whether the taxed funds were made up of sums whose annual accretions were subject to the income tax, no matter how they were allocated in the corporate accounts. At any rate as between dividends and such "reserves", contingent or absolute, the preference in exemption would naturally be for the second, and a tax which covers them must cover the first. Furthermore, whatever may be said as to taxing any "reserves" whatever, to tax the dividends of a mutual company is at least consistent with the distinction between its obligation as insurer and the profit of the members as a group. True, there can be no profits save as they come from premiums, and dividends are in substance a return pro tanto of what has come out of their pockets. Nevertheless the group, as such, does make profits or losses, and there is more than a formal reason for treating separately what it may engage to pay according to the tenor of its contracts, and what it distributes, even though those very contracts stipulate that there shall be a distribution.

That this results in inequality between mutual and stock companies is true. As to "reserves" there can be no doubt; the stock companies escape all such taxes, the mutual do not, unless they hold no more than those "required by law." As to dividends the inequality is not so clear. To be sure they would seem to fall within the phrase, "such deposits * * * as they are required by * * * con-
[fol. 172] tract to maintain for * * * apportionment among policy holders," especially when "apportionment" is contrasted with "protection" and "payment". Yet it is at least open to argument that dividends, though the policy may secure them, are not "required by contract", and that the same distinction was intended between payments as such and profits, as appeals in Section 1000 (c). For it is possible to regard the policy holders even of a stock company as also associates in the enterprise, and perhaps that is the juster view. But even if it is not, and if the dividends of such policy holders are exempt, Congress may have intended to insist upon the legal distinc-

tion between them and shareholders. Whatever the resulting inequalities, § 1000 (c) was certainly intended to be the sole measure of the tax on mutual companies, and its language bears evidence of being deliberately chosen. We cannot temper the result without disregarding its plain sense.

Finally, unless we are to suppose that mutual companies were taxed on dividends, there was very little which could be reached at all. Not all such companies have "contingent reserves" and the "surplus", after the deduction of reserves of all sorts and dividends, may be, as here it would be, a very small matter, or nothing at all. The phrase, "maintained for the general use of the business", might indeed lend color to the plaintiff's position, were it not affixed not only to "surplus", but to "contingent reserves" as well. It is however impossible to see in what [fol. 173] sense such reserves are maintained for the general use of the business which does not equally apply to dividends. If the clause means that the surplus must be unallocated for any purposes, it is not appropriate to "contingent reserves."

There remains the second question raised by the appeals, which is whether the taxes levied for the years beginning July 1, 1920, and July 1, 1921, had the support of any statute. Section 1000 (a) (1) of the Act of 1918 levied a "special excise tax with respect to carrying on or doing business", upon the "fair average value" of the capital "for the preceding year ending June 30", and sub-division c. provided that it should not apply "to any corporation which was not engaged in business * * * during the preceding year." The district court decided that the tax was levied for the preceding year, but that that due July 1, 1921, was in force notwithstanding the Act of 1921. The tax for the following year was not however in force, because the statute had been repealed before July 1, 1922. Each side appeals from this ruling.

As to the fourth year,—July 1, 1921 to June 30, 1922,—we have no doubt. If the tax is levied for the preceding year it is conceded that by § 1400 (a) of the Act of 1921, § 1000 of the Act of 1918 was repealed to take effect as of January 1, 1922, and there was therefore no statute in effect in the following July. We think that the same is true, even though the tax was payable in advance, as the

defendant maintains. Section 1400 (b) of the Act of 1921 provided: "In case of any tax imposed by any part of the [fol. 174] Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect." Section 243 of the Act of 1921 imposed "in lieu of the taxes imposed by sections 236 and 1000" a tax upon "the net income of every life insurance company" "for the calendar year 1921" and thereafter. Section 1000 of the Act of 1921 reënacted the capital stock tax of § 1000 of the Act of 1918 which was to be "in lieu of" it. It did not comprise insurance companies. While the words, "§ 1000", in § 243 of 1921 refer to § 1000 of that act, and verbally the income tax was therefore only in lieu of the capital stock tax of 1921, it was nevertheless also "in lieu of" the tax of 1918, because it took the place of the capital stock tax of 1921, which in turn took the place of the preceding tax of 1918. Hence the passage quoted from § 1400 (b) applied to it, and the tax in suit could not be levied on July 1, 1921, even though payable in advance. The income tax levied by § 243 of the act of 1921,—"the corresponding tax",—had already "taken effect" on that day; it included the calendar year 1921, although collected only in 1922. It could not have been the intent of Congress to impose two taxes for the period between July 1, 1921, and June 30, 1922, when one was "in lieu" of the other. Since the Act of 1921 was enacted after July 1, 1921, this indeed results in the remission of the capital stock tax already levied on July 1, 1921, but the language of § 1400 (b) seems to us to demand that result.

[fol. 175] As to the tax for the year before, the case is more troublesome. There is no difficulty, if that tax is payable in advance, because the income tax had not "taken effect" on July 1, 1920. If however it was payable for the preceding year, the tax due July 1, 1921, in part covered a period during which the income tax had already "taken effect"; it did not any longer "remain in force." Owing to the difference in the period of taxation, the inevitable alternative is between levying a double tax upon the plaintiff for the first six months of 1921, or allowing it to escape all such taxation for the previous half year. The answer

must depend upon whether taxes under § 1000 of the Act of 1918 were levied in advance or for the preceding year. They were construed in the former sense by the Treasury, (Reg. 50, Art. 1), and so had been the tax of 1916; which was almost literally the same. Such an interpretation, already made when the Act of 1918 was passed, is strong evidence of intent, (National Lead Co. v. U. S., 252 U. S. 140, 145, 146; Heiner v. Colonial Trust Co., 275 U. S. 232, 235). Moreover, these are "special taxes", long known to our fiscal system, and generally payable in advance, (§ 186, Title 26, U. S. Code). It is true, as the district court observed, that § 1000 (c) of 1916 provides that "the taxes imposed * * * shall not apply in any year to any corporation which was not engaged in business * * * during the preceding year"; and § 1000 (a) (1) computes them on "the fair average value" of the capital for the preceding year. Of course it is impossible to calculate [fol. 176] such a tax in the case of a company that had done no business during any part whatever of the preceding year. But § 1000 (c) does not say that the company must have been in business "during the whole of the preceding year", but only "during the preceding year." The same applies to the use as a basis of the "fair average value for the preceding year." It was entirely possible to compute the tax in the case of a company which had been in business for a part of the preceding year, and this satisfies all that the words demand. The Court of Claims, (Washington Water Power Co. v. U. S., 56 Ct. Claims 76), has decided in a case arising under the Act of 1916, that the tax is payable in advance, and this seems to us the proper construction. Finally, as we have said, the tax had its origin in the Revenue Act of 1916, which imposed it for the year beginning January 1, 1917. While it is possible that Congress meant to levy it for a period during which the act was not in effect, the language is "on and after January 1, 1917." It is more likely that such an excise in accordance with the usual theory, was laid prospectively upon an activity to be engaged in, than upon its pursuit during a time when there was no tax in view.

Judgment affirmed.

[fol. 177] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

New York Life Insurance Company, Plaintiff-Appellant,

v.

Frank K. Bowers, as Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York.

Judgment Filed Mar. 10, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 178-184] [File endorsement omitted.]

[fol. 185] Petition for rehearing covering 7 pages filed Mar. 20, 1930, omitted from this print.

It was denied, and nothing more by order April 7, 1930.

[fol. 186] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Order Denying Petition for Rehearing—Filed Apr. 7, 1930

A petition for a rehearing having been filed herein by counsel for the defendant;

Upon consideration thereof it is Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 187] [File endorsement omitted.]

[fol. 188-189] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 190] SUPREME COURT OF THE UNITED STATES

No. 93, October Term, 1930

NEW YORK LIFE INSURANCE COMPANY, Petitioner,

vs.

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York.

ORDER ALLOWING CERTIORARI—Filed June 2, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 191] SUPREME COURT OF THE UNITED STATES

No. 160, October Term, 1930

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY

ORDER ALLOWING CERTIORARI—Filed June 2, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 34,982, 35,080. U. S. Circuit Court of Appeals, Second Circuit, Term No. 930. New York Life Insurance Company, Petitioner, vs. Frank K. Bowers, Collector of Internal Revenue for the Second District of the State of New York. Filed April 26, 1930. Term No. 160. Frank K Bowers, Collector of Internal Revenue for the Second District of the State of New York, Petitioner, vs. New York Life Insurance Company. Petitions for writs of certiorari and exhibit thereto. Filed May 26, 1930, File Nos. 34,982, 35,080.

(5047)

FILE COPY

APR

CHARLES E.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 93

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

against

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

JAMES H. McINTOSH,
Attorney for Petitioner,
Office and P. O. Address,
No. 120 Broadway,
Borough of Manhattan,
City of New York.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

No.

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

AGAINST

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of the State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New York Life Insurance Company, applies for a Writ of Certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit affirming the judgment of the Trial Court, and says,—

Jurisdiction of the Court.

This application is made under and pursuant to Section 240 of the Judicial Code, as amended (43 Stat. 938). The judgment was entered March 10th, 1930 (R. 177).

Brief Statement of the Questions Involved.

FIRST: The Revenue Act of 1921 (Section 243) imposed a special income tax on life insurance for 1921 in lieu of the Capital Stock Tax. Notwithstanding this, was your petitioner liable for a Capital Stock Tax for the year ending June 30, 1921? The court held that it was.

SECOND: Section 1000 of the Revenue Act of 1918 imposed a Capital Stock Tax on mutual life insurance companies on the basis of the value of their assets over their liabilities, substantially as in *Hecht* v. *Malley,* 265 U. S. 144. In calculating the tax was the Commissioner justified,—

(a) In excluding from the liabilities side such deposits as the company was required by contract to hold for apportionment among and payment to its policyholders? and

(b) In excluding from the liabilities side dividends declared and paid to the policyholders during the current year?

THIRD: Does sub-section (b) of Section 1000 of the Revenue Act of 1918, which says that,—"In computing the tax in the case of insurance companies such deposits * * * as they are required by * * * contract to * * * hold for * * * payment to or apportionment among policyholders shall not be inclnded", apply only to stock life insurance companies and not to mutual life insurance companies?

FOURTH: Are deposits which life insurance companies are required by contract to hold for apportionment among and payment to policyholders "surplus or contingent reserves *maintained for the general use of the business*"?

FIFTH: Are dividends duly declared and payable during the year on the anniversary of each policy "surplus or contingent reserves *maintained for the general use of the business*"?

Brief Statement of the Facts.

1. This suit involves the Capital Stock Tax collected from the plaintiff under Section 1000 of the Revenue Act of 1918 for the years ending June 30, 1919, June 30, 1920, and June 30, 1921. The case was tried on an agreed statement of facts. Section 1000 is printed in full as an appendix to this petition and brief.

2. The petitioner is a mutual life insurance company transacting the business of life insurance on the mutual, level premium plan (R. 60).

3. The essence of mutual life insurance on the level premium plan is that each insured is entitled to receive and must receive his insurance at cost (R. 63).

4. An accounting made at the end of each year determines the excess in the premium over the actual cost and this excess belongs and is returned to the policyholders as their several policies require (R. 64, *et seq.*).

5. There are two plans for returning to policyholders the premiums they paid in excess of cost. One plan is called the annual dividend plan, the other the deferred dividend plan; but under each plan the insurance cost is exactly the same (R. 68, *et seq.*). These sums which the policyholders paid in excess of cost are not surplus or contingent reserves maintained for the general use of the business. They are sums which belong to the policyholders who paid them and which must be returned to those policyholders, not maintained for the general use of the business (R. 78, *et seq.*).

6. In *Hecht* v. *Malley*, 265 U. S. 144, the Commissioner, in assessing the Capital Stock Tax on a Massachusetts corporation that had no fixed share capital, determined the taxpayer's liability by ascertaining the value of the tax-

payer's assets in excess of its liability, and by imposing the Capital Stock Tax on the net sum so ascertained. This Court held that this was the proper way to impose the Capital Stock Tax on a corporation that had no fixed share capital. But in assessing the petitioner the Commissioner did not follow this rule. On the contrary, he threw out from the liabilities side of the petitioner's account each year the following three items,—

(1) Dividends declared on annual dividend policies;

(2) Dividends declared on deferred dividend policies; and

(3) Deposits which the plaintiff was required by its outstanding contracts to hold for apportionment among and payment to its stockholders.

7. To show specifically the way the Commissioner imposed the tax for each year, let us take as an illustration the exact way in which he calculated the tax for the year ending June 30, 1919, each other year being similarly calculated,—

"Every insurance company is required by law to file annually in each state where it transacts business, in the office of the Superintendent of Insurance or other corresponding state officer having supervision of insurance, a report showing among other things its income and disbursements for the preceding calendar year, which report must include a statement of its assets and liabilities.

"Such reports are required to be made upon uniform blank forms prepared by a committee of, and adopted by, the National Association of Insurance Commissioners, and known as 'Convention Edition forms'" (R. 73, *et seq.*).

The plaintiff duly filed this report each year on the form furnished it by the Superintendent of Insurance for that purpose (R. 73). In assessing the tax the Commissioner (R. 74, *et seq.*) took the amount of the plaintiff's admitted assets as shown by this annual report for the proper year and deducted

therefrom the difference between the book value and the market value thereof, and deducted also certain liabilities as shown thereby; but he did not deduct the excess in the premium over the actual cost of insurance which the plaintiff's contracts required it to return to the policyholders and which it duly declared as dividends and did return to them in accordance with the terms of their respective contracts, or the sum which it held for apportionment among and payment to them as their several contracts required. By failing to deduct these sums the Commissioner made the plaintiff appear to have a surplus or contingent reserve maintained for the general use of the business in the respective sums which formed the basis of the taxes in dispute.

For the year ending June 30, 1919, as shown by the Fifteenth paragraph of the agreed statement of facts (R. 74) and by Exhibit F (R. 126, *et seq.*), this calculation was as follows,—

Total admitted assets (line 47, R. 126).	$934,929,381.52
DEDUCTIONS (R. 74 and 127).	
(1). The difference between the book value and the market value of said admitted assets.....	$50,291,672.51
(2). The amount of legal reserves (R. 127) as shown by	
7. Net reserves (Paid —for basis).....	728,484,785.00
8. Extra reserve for total and permanent disability and accidental benefits.....	563,494.00
9. Present value of amounts not yet due on supplementary contracts not involving life contingencies	5,462,720.13

(3).	10. Present value of amounts incurred but not yet due for total and permanent disability benefits.....	213,892.00
	11. Liability on policies cancelled and not included in net reserve.	467,963.84
	12 to 20 inclusive. Unpaid policy claims..	10,350,318.67
	21. Due and unpaid on supplementary contracts *not* involving life contingencies	13,849.75
	22. Dividends left with the Company to acccrue at interest and accumulated interest thereon	2,180,726.52
	23. Premiums paid in advance, including surrender values so applied	1,093,413.43
	24. Unearned interest $3,129,273.54 and rent $7,607.38 paid in advance	3,136,880.92
	25. Commissions due agents on premium notes when paid.....	24,091.55
	26. Commissions to agents due or accrued..	9,632.41
	28. Salaries, rents, office expenses, bills and accounts due or accrued (including $3,350.72 accrued charges on deposits)	177,424.46
	29. Medical Examiner's fees $26,908.22; Inspector's fees $5,-	

736,90; and legal fees $4,719.96; due or accrued	37,365.08	
30. Estimated Amount hereafter payable for Fed., State and other taxes based upon the business of the year of this statement (including $41,370.75 accrued taxes on interest and deposits)	1,957,353.36	
34. Dividends or other profits due policyholders including those contingent on payment of outstanding and deferred premiums.....	1,741,222.65	
(4). Exemption	5,000.00	
Total Deductions.....		$810,429,008.03
Leaving a difference of.....		$124,500,373.49

Upon this difference the Commissioner assessed and collected a tax for the year ending June 30, 1919 of $124,500 (R. 74).

8. Liability items which the Commissioner did not deduct for the year ending June 30, 1919, or similar items for any year but should have deducted, were as follows (R. 127):

(1). Dividends declared on annual dividend policies (Line 35, Exhibit F, R. 127).	$12,437,514.00
(2). Dividends declared on deferred dividend policies (Line 36, Exhibit F, R. 127).	14,123.549.64
(3) Deposits which the petitioner was required by its contracts to hold for apportionment among and payment to its deferred dividend policyholders (Line 36, Exhibit F, R. 127).....	107,041,778.00

The opinion of the Circuit Court of Appeals (R. 165) is not yet reported. The opinion of the District Court (R. 43) is reported in 34 Fed. 2nd, 60.

Reasons Relied on for the Allowance of the Writ.

FIRST: The Court of Appeals has decided in this suit important questions of Federal law which have not been but which should be settled by this Court.

SECOND: The case involves questions of such public and general importance as require that a consideration and determination thereof should be made by this Court. Practically all life insurance corporations doing business in this country are interested in the decision of these questions. Some of them have suits pending, and all are looking forward to the final decision of this case for the settlement of their rights. No other suit involving these questions has been brought to trial, so far as petitioner knows.

THIRD: Notwithstanding Section 243 of the Revenue Act of 1921 provides "that in lieu of the taxes imposed by Section * * * 1000 (the Capital Stock Tax) * * * there shall be levied, collected and paid for the calendar year 1921, and for each taxable year thereafter, upon the net income of every life insurance company a tax as follows", and Section 200 defines the first taxable year as "the calendar year 1921 or *any fiscal year ending during the calendar year 1921*", the court erroneously held the petitioner liable for a Capital Stock Tax under Section 1000 for the year ending June 30, 1921.

FOURTH: The decision of the court is contrary to the decision of this Court in *Hecht* v. *Malley*, 265 U. S. 144.

FIFTH: Dividends declared were a fixed liability of the petitioner which could not be excluded in any statement based upon the assets and liabilities, and must be deducted in arriving at net assets.

SIXTH: Deposits which the petitioner was required by its policy contracts to hold for apportionment among and payment to a class of its policyholders were not, as the court held, surplus or contingent reserves maintained for the general use of the business, but were a specific liability of the petitioner payable to the class of policyholders for whom they were held; and also they were expressly excluded by sub-section (b) of Section 1000, which says,—"In computing the tax in the case of insurance companies, such deposits * * * as they are required by * * * contract * * * to hold for * * * payment to or apportionment among policyholders shall not be included."

SEVENTH: Sub-section (b) of Section 1000 of the capital Stock Tax of 1918 applies to all insurance companies without any limitation or qualification, and to limit it as the court did to insurance companies having a capital stock is not construction; it is amendment.

WHEREFORE, your petitioner respectively prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Second Circuit commanding said court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in said case, and that said judgment of the United States Circuit Court of Appeals for the Second Circuit may be reversed and a new trial granted, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioner will ever pray.

NEW YORK LIFE INSURANCE COMPANY,
By JAMES H. McINTOSH,
its Attorney.

SUPPORTING BRIEF.

I.

No Capital Stock Tax for the year ending June 30, 1921, because the Revenue Act of 1921, which took effect as to income taxes, as of January 1, 1921, imposed a special income tax upon life insurance for 1921 and thereafter in lieu of the Capital Stock Tax.

The Revenue Act of 1921 says,—"Section 263. This title (the income tax) shall take effect as of January 1, 1921."

Section 200 of the Revenue Act of 1921 says,—"The first taxable year to be called the taxable year 1921 shall be the calendar year 1921, *or any fiscal year ending during the calendar year 1921.*"

Section 243 of the Revenue Act of 1921 provides as follows,—

> "That in lieu of the taxes imposed by Sections 230 (the income tax on corporations generally) and 1000 (the capital stock tax) and by Title III, (war profits and excess profits tax) there shall be levied, collected and paid for the calendar year 1921 and for each taxable year thereafter, upon the net income of every life insurance company a tax as follows:"

And then the Act goes on to impose on life insurance a special income tax for 1921 and for each taxable year thereafter, which shall be in lieu of the capital stock tax and the other Federal taxes referred to.

Section 1400 of the Revenue Act of 1921 says,—

> *"In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision*

imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act."

The corresponding tax under the Act of 1921, namely, the special income tax imposed on life insurance in lieu of the capital stock tax, took effect, under the provisions of the 1921 Act, January 1, 1921. Therefore, after January 1, 1921 there was no statute imposing a capital stock tax on life insurance.

II.

If a corporation had no capital stock, the 1918 Act taxed as capital stock the net value of its assets over its liabilities, and life insurance corporations were no exception to this rule.

1. Under the 1918 Act, the Commissioner assessed the Massachusetts Trusts on the net value of their assets over their liabilities, and this Court held that this was the correct way to assess them.

Hecht v. *Malley*, 265 U. S. 144.

In the syllabus in that case it is said,—"In the absence of a fixed share capital the capital stock is the net value of the property owned by the association and used in its business." And on page 163 MR. JUSTICE SANFORD, in delivering the opinion of the Court, said,—

> "We think that in the Act of 1918, in which the tax upon an association is based upon the average value of its 'capital stock', including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted, in their entirety, and, in the absence of a fixed share capital, as equivalent to the capital invested in the business, that is, the net value of the property owned by the association and used in its business. As was said by the Circuit Court of Appeals,

the phrase in the Statute as to 'including surplus and undivided profits puts beyond doubt the question of the congressional intent to measure this tax by business and financial realities, not by bookkeeping forms or mere names.' And this construction is in harmony with the provision as to the excise tax on a foreign association, which is fixed upon the value 'of the capital actually invested in the transaction of its business in the United States'.

"We therefore conclude that the Crocker Association was also subject to the tax, and that this was properly *measured by the Collector by the net value of its property*—no question being made as to the correctness of his valuation."

The Department itself seemed to hold that the basis of the tax on a non-stock corporation was the difference between the value of its assets over its liabilities, because in an opinion by the Solicitor of Internal Revenue laying down rules for taxing mutual insurance companies under the 1918 Act, the Solicitor held,—

"2. In determining the amount of the assets upon which the capital stock is to be assessed, there should be deducted from the total assets the following amounts:

(1) The debt liabilities;

(2) The legal reserves;

(3) Such percentage of the amount of shrinkage from the total value of the assets to the market value of the assets as the amount of the assets in excess of the legal reserves bears to the total assets."

Internal Revenue Bulletin, Vol. 1, No. 18, May 1, 1922, p. 37.

2. Mutual life insurance corporations are no exception to this rule. On the contrary, the express language of the statute shows that this rule was intended. It imposes the tax upon "surplus or contingent reserves *maintained for the general use of the business.*"

What is meant by "surplus or contingent reserves maintained for the general use of the business."? It means the excess of the assets over liabilities. "Surplus or contingent reserves" is an expression which is well understood in the business of life insurance. It is precisely that sum representing the value of the assets in excess of the liabilities of the corporation which it maintains for the general use of the business and to meet unforeseen contingencies. If, therefore, in any given year the amount of the liabilities equals or exceeds the value of the assets, is that any reason why specific liabilities, like declared dividends and overpayments of premiums which are held awaiting apportionment among and payment to the policyholders who made the overpayments, should be thrown out from the liability side of the account in order to force a false and nonexistent surplus or contingent reserve on which to impose a tax?

Not merely is the decision of the court contrary to the rule laid down by this Court in *Hecht* v. *Malley* but it establishes a false surplus or contingent reserve for the purpose of imposing a capital stock tax on an imaginary capital valuation for the year ending June 30, 1919 in excess of $124,000,000, and a like imaginary capital valuation for each other year. Whoever heard of a life insurance corporation having a capital stock of any such value?

III.

Why should dividends declared, and the deposits the petitioner is required by its outstanding contracts to hold for apportionment among and payment to its policyholders, be excluded from the liability side of its account?

1. Dividends declared are such a well-known, fixed liability of the corporation that the subject will not admit of discussion before this Court.

2. In assessing this tax the Commissioner threw out from the liability side of the account Item 37 of the petitioner's annual report for the year ending December 31, 1917 (Exhibit F, R. 127),—

> "Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies, not included in Item 36 ..... $107,041,778",

and a like Item 37, but less in amount, for each subsequent year (Exhibit G, R. 131, Exhibit H, R. 135, Exhibit I, R. 139).

(a) Exactly what was this important item that the Commissioner threw out of the liability side of the account?

"It is the essence of mutual insurance on the level premium plan that each policyholder is entitled to receive his insurance at cost; the company collecting its estimated, or level, premiums in advance and adjusting the actual cost afterwards when cost is known" (R. 63). At the end of each calendar year the petitioner takes an account of the business of the year and thereby ascertains the amount which each insured overpaid it for the year (R. 65), and accounts to each policyholder for the sum which he overpaid in the manner agreed to in his policy.

The petitioner has outstanding two classes of policies, one called the annual dividend class and the other the deferred dividend class (R. 68). To policyholders in the annual dividend class, the annually ascertained overpayments are paid back each year. To policyholders in the deferred dividend class, the annually ascertained overpayments, which are the same in amount (R. 68) "for each $1,000 of insurance on policyholders of the same age and insurance plan whether the policy is on the deferred or is on the annual dividend plan", is not annually returned to the policyholders, but these overpayments are (R. 70) "credited to the plaintiff's deferred dividend policyholders as a class", accumulated at interest and apportioned among and paid to the deferred dividend policyholders on the date named in their several contracts for making such payments.

This Item 37 which the Commissioner threw out from the liability side of the petitioner's account consists of the overpayments of premiums made by the petitioner's deferred dividend policyholders, which is thus held by the petitioner, as its policy contracts require, for apportionment among and payment to its deferred dividend policyholders on the several dates named for that purpose in their respective contracts.

(b) Are these overpayments of premiums, credited to the deferred dividend policyholders and held for apportionment among and payment to them respectively on the dates stated in their several contracts, surplus or contingent reserves *maintained for the general use of the business?*

Obviously they are not. They are sums derived from the deferred dividend policyholders only, that belong solely to the deferred dividend policyholders, that are held to the credit of the deferred dividend policyholers, which the petitioner's contracts require the petitioner to apportion among and pay to the deferred dividend policyholders. Other policyholders of the corporation have no interest whatever in them.

(c) This item should not have been thrown out of the liability side of the account not merely because it is a liability

but also because the statute plainly says it should not be. Section 1000 says,—

> "(b) In computing the tax in the case of insurance companies such deposits and reserve funds as they *are required by* law or *contract to* maintain or *hold for* the protection of or *payment to or apportionment among policyholders shall not be included.*"

(d) The learned Trial Court sustained the Commissioner in throwing out this item on the ground (R. 46) that subsection (b) applied to stock corporations only and not to mutual corporations. Why? The Act does not say so. The Act says,—"In computing the tax in the case of insurance companies", without any exception or word of limitation. No language could be more generic than the language here used.

The Trial Court, however, in order to reach the conclusion the Court reached, amends the Act. The Court grafts onto it an exception, a limitation, that is not there. By construction the Court gives the Act the meaning it would have if instead of saying what it so plainly says, it said,—In computing the tax in the case of insurance companies, *except mutual companies.* The Court cannot do this. It is amendment, not construction; a legislative, not a judicial, function.

Smietanke v. *First Trust & Savings Bank,* 257 U. S. 602;
Bate Refrigerator Co. v. *Sulzberger,* 157 U. S. 1;
Commr. of Immigration v. *Gottlieb,* 265 U. S. 310;
United States v. *Missouri Pacific,* 213 Fed. 169;
Atlantic Coast Line v. *United States,* 168 Fed. 175;
Lynch v. *Alworth-Stephens Company,* 294 Fed. 190;
Omaha Water Co. v. *City of Omaha,* 147 Fed. 1;
Wrightman v. *Boone County,* 88 Fed. 435.

(e) The argument of the Court of Appeals is hard to follow. I cannot understand from the Court's opinion whether the Court intended to follow the Trial Court or not,

and hold that sub-section (b) had no application to mutual insurance. Anyhow, the Court does not seem clearly to grasp the exact nature of the sum in question because the Court says (R. 169), "In these (mutual companies), though all the policyholders are collectively the debtor to each one, all are also members of the company and therefore collectively owners of any profits which it may make." But no one has any interest in the sum in question except the deferred dividend policyholders whose overpayments make it up. Anyhow, this sum is clearly a liability of the company and could not properly be excluded in any statement based upon assets and liabilities. And this is especially true where the statute expressly says as here,—"In computing the tax in the case of insurance companies such deposits * * * as they are required by * * * contract to hold for payment to or apportionment among policyholders shall not be included." A more exact description of the sum in question could not be made. Hence if a tax is assessed under this statute according to the terms of the statute, this sum could not be excluded from the petitioner's liabilities.

Conclusion.

This is a case, therefore, which this Court ought to review. Not merely because the petitioner has been taxed for a year in which Congress imposed another tax in lieu of the capital stock tax, but because the petitioner has been taxed on a fictitious capital stock valuation arising from the erroneous exclusion of liabilities, and because the decision of the Court is contrary to the decision of this Court in *Hecht* v. *Malley*, 265 U. S. 144.

Respectfully submitted,

JAMES H. MCINTOSH,
Counsel for Petitioner,
120 Broadway,
New York City.

24 April, 1930.

APPENDIX.

The Capital Stock Tax Law.

Section 1000 of the Revenue Act of 1918, is as follows,—

"SEC. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1). Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June thirtieth as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth.

(b) In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

(c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in Section 231. The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close

of the preceding accounting period used by such company for purposes of making its income tax return; *Provided,* that in the case of a foreign Mutual Insurance Company the tax shall be equivalent to $1 for each $1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return.

(d) Sec. 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section."

Office Supreme Court, U
MAY 26 1930
CHARLES ELMORE CRO
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No. ~~49~~ 160

In the Supreme Court of the United States

OCTOBER TERM, 1929

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK, PETITIONER

v.

NEW YORK LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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CITATIONS

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Revenue act of 1918, c. 18, sec. 1000, 40 Stat. 1057	2, 3, 4, 6, 9, 11, 12, 14
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FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE for the Second District of the State of New York, petitioner

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NEW YORK LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Frank K. Bowers, as Collector of Internal Revenue for the Second District of the State of New York, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered March 10, 1930 (R. 173), in so far as said judgment is adverse to your petitioner.

Respondent has made application to this Court for a writ of certiorari on the question whether or

not it is subject to the capital stock tax imposed by Section 1000 (c) of the Revenue Act of 1918 for the periods ending June 30, 1919, June 30, 1920, and June 30, 1921, decided adversely to it by said Circuit Court of Appeals. Petitioner, conceding that this question is of public importance, represents to the Court that there is another question in this case, which is of equal public importance, namely, whether by reason of the provisions of the Revenue Act of 1921 respondent was relieved from the payment for the period beginning July 1, 1921, and ending June 30, 1922, of capital stock taxes imposed upon mutual life insurance companies by Section 1000 (c) of the Revenue Act of 1918.

STATEMENT

Respondent, a corporation transacting the business of life insurance on the purely mutual, level premium plan, brought suit in the District Court of the United States for the Southern District of New York, seeking recovery of capital stock taxes assessed and collected under the provisions of Section 1000 (c) of the Revenue Act of 1918 for the periods ending June 30, 1919, June 30, 1920, June 30, 1921, and June 30, 1922. (R. 2–27, 60.)

The District Court held that respondent was subject to the capital stock taxes imposed upon mutual life insurance companies by Section 1000 (c) of said Revenue Act of 1918 for the periods ending June 30, 1919, June 30, 1920, and June 30, 1921, but as to the last period beginning July 1, 1921, and

ending June 30, 1922, held that respondent was relieved from the payment of said capital stock taxes by reason of the provisions of Sections 243, 1000 (b) and 1400 (b) of the Revenue Act of 1921, and rendered judgment accordingly. (R. 43–57.) This judgment was affirmed by the Circuit Court of Appeals. (R. 173.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the capital stock tax provisions of the Revenue Act of 1918 were repealed by the Revenue Act of 1921 as of January 1, 1922, without limitation.

2. In holding that the income tax imposed upon life insurance companies by Section 243 of the Revenue Act of 1921 was in lieu of the capital stock tax imposed upon such companies by Section 1000 (c) of the Revenue Act of 1918 for the period beginning July 1, 1921, and ending June 30, 1922.

3. In holding that respondent was entitled to recover the capital stock tax paid for the period beginning July 1, 1921, and ending June 30, 1922.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in holding that Section 1000 (c) of the Revenue Act of 1918 was repealed as of January 1, 1922, without limitation, by Section 1400 of the Revenue Act of 1921, has misconstrued Section 1400, and has not given proper effect to the saving clauses therein set forth.

2. The Circuit Court of Appeals has misconstrued the "in lieu" provisions of Section 243 and the provisions of Section 1000 (b) of the Revenue Act of 1921 in holding that the income tax imposed upon life insurance companies by said Section 243 of the Revenue Act of 1921 is "in lieu" of the capital stock tax imposed upon such companies by Section 1000 (c) of the Revenue Act of 1918 for the period beginning July 1, 1921, and ending June 30, 1922.

3. The question whether or not the capital stock tax provisions of the Revenue Act of 1918 were repealed as of January 1, 1922, by Section 1400 of the Revenue Act of 1921 is one of great public interest and of great importance to the Government in the administration of these revenue laws.

4. The question whether or not the tax imposed by Section 243 of the Revenue Act of 1921 is in lieu of the capital stock tax imposed on insurance companies by Section 1000 of the Revenue Act of 1918, is likewise one of public interest and of great importance to the Government in the administration of the revenue laws.

5. There are many cases now pending in the courts and before the Treasury Department involving these questions and a final decision by this Court will establish a rule for the settlement of all of these cases.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, in so far as the same is adverse to your petitioner, should be granted.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court (R. 43) is reported in 34 F. (2d) 60. The opinion of the Circuit Court of Appeals (R. 165) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 10, 1930. (R. 173.) Petition for rehearing was denied on April 7, 1930. (R. 178.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Revenue Act of 1921 repealed as of January 1, 1922, without limitation, the capital stock taxes imposed upon mutual life insurance companies by Section 1000 (c) of the Revenue Act of 1918.

2. Whether income taxes imposed upon mutual life insurance companies by Section 243 of the Revenue Act of 1921 are "in lieu" of the capital stock taxes imposed upon such companies by Section 1000 (c) of the Revenue Act of 1918 for the period beginning July 1, 1921, and ending June 30, 1922.

STATUTES AND REGULATIONS INVOLVED

These appear in the Appendix, pp. 14–19, *infra*.

STATEMENT

A statement of the facts will be found in the petition, pp. 2–3, *supra*.

ARGUMENT

The capital stock taxes imposed upon respondent under the Revenue Act of 1918 were specifically designated "special taxes."

With respect to special taxes the Act of October 1, 1890, c. 1244, Sec. 53, 26 Stat. 567, 624 (U. S. C., Title 26, Sec. 186) provides that—

> all special taxes shall become due on the first day of July * * * in each year * * * or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; * * *.

Regulations duly promulgated by the Treasury Department under the Revenue Acts of 1916, 1918 and 1921 so provided. These regulations are set out in the Appendix, *infra*, pp. 17–19. Thus, the tax was payable in advance for the privilege of carrying on business for one year, and on July 1, 1921, the capital stock tax imposed upon respondent for the period ending June 30, 1922, had accrued and was due and payable.

The Circuit Court of Appeals, agreeing that the tax was payable in advance, nevertheless held that the statute was repealed for the fourth year ending June 30, 1922. In so holding we submit that the Court failed to give proper effect to the limitations contained in Section 1400 (b) of the Revenue Act of 1921.

Section 1400 (a) provides:

> That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b): * * *

Subdivision (b) contains this limitation:

> The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect * * *.

The effect of this provision is that apart from any formal repeal of the capital stock tax provisions of the Revenue Act of 1918 as of January 1, 1922, they remained in force for the purpose of validating the collection of the tax for the period beginning July 1, 1921.

Section 1000 (a) of the Revenue Act of 1921 provided that—

> on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

certain taxes shall be imposed. Thus it was only after July 1, 1922, that the capital stock tax provisions of the Revenue Act of 1921 became effective, and this was intended to be " in lieu of the tax imposed by section 1000 of the Revenue Act of 1918 " only after that date and not before.

It was the evident intent of Congress to continue the capital-stock tax imposed by the Revenue Act of 1918 without interruption until the capital-stock tax imposed by the Revenue Act of 1921 became effective on July 1, 1922. But the capital-stock tax imposed by the 1921 Act was not applicable to insurance companies. In lieu thereof such companies were subjected to a special income tax by Section 243. This was in lieu of the new capital-stock tax and there is no evidence of an intent that the 1918 capital-stock tax was to end any earlier in the case of insurance companies than in the case of other companies. On the contrary, the legislative history indicates that Congress intended insurance companies to remain subject to the 1918 capital-stock tax until all companies were relieved from it by the taking effect of the new tax.

The report of the Senate Finance Committee (Senate Report No. 275, 67th Congress, 1st Ses-

sion) accompanying the Revenue Bill of 1921, contains the following (p. 20):

> Sections 242–246 provide a new plan for the taxation of life insurance companies, substantially similar to the plan embodied in the revenue act of 1918 as first adopted by the Senate. The provisions of the present law applicable to life insurance companies are imperfect and productive of constant litigation. The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income. The new tax would take the place of the present income and excess-profits taxes for the year 1921, *and life insurance companies would share with other insurance companies in the repeal in the year 1922 of the capital stock tax* and the taxes imposed by section 503. The new tax will yield a larger revenue than the taxes which it is proposed to replace. (Italics ours.)

In holding that Congress did not intend that insurance companies should be subject to the 1918 capital stock tax at a time when the new income tax imposed by Section 243 of the 1921 Act was in effect, the court below has overlooked the fact that insurance companies were specifically subjected to three different taxes at the same time by the 1918 Act. (Secs. 230, 301, 1000.)

In any event, it is clear that on July 1, 1921, before the passage of the 1921 Act, respondent came under an absolute liability to pay taxes for the privilege of carrying on its business for the ensuing year. These taxes were imposed by Section 1000 (c) of the 1918 Act and there is no intimation in the 1921 Act, passed November 23, 1921, that Congress intended any remission of the taxes theretofore due and payable. It is settled that a taxpayer has the burden of showing that he comes strictly within the language of statutes exempting from taxation and we submit that this rule of strict construction is equally applicable when a statute is relied upon to remit, by implication, a tax already due and payable. As said by the District Court (R. 50) Congressional intent to remit taxes is not lightly to be presumed. Accordingly, the District Court held that the 1921 Act did not invalidate the tax due and payable July 1, 1921. That court gave judgment for the recovery of the tax for the period July 1, 1921, to June 30, 1922, on the assumption that the tax for that period was not due until July 1, 1922, which assumption we dispute.

Section 1400 (b) of the 1921 Act contains the further limitation:

> In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such

> tax shall remain in force until the corresponding tax under this Act takes effect * * *.

The Circuit Court of Appeals held that the capital stock tax was payable in advance; that the income tax imposed by Section 243 of the 1921 Act was in lieu of the capital stock tax imposed by Section 1000 of the 1918 Act, and hence that the quoted language of Section 1400 (b) was applicable. Upon this reasoning it held that since the tax imposed by Section 243 took effect January 1, 1921, the levy of the capital stock tax on July 1, 1921, was invalid.

By its terms Section 243 of the 1921 Act imposed taxes in lieu of Section 1000 of the same Act, and also in lieu of taxes imposed by Section 230 and by Title III of that Act; but there is nothing in its language which comprehends the imposition of any tax in lieu of the taxees here in question imposed by Section 1000 of the Act of 1918. One must therefore look to the corresponding Section 1000 of the Act of 1921 to find provision for the imposition of any tax which takes the place of the taxes previously imposed by Section 1000 of the Act of 1918. But Section 1000 of the Act of 1921 is effective for this purpose only on and after July 1, 1922. Thus Section 243, by its own terms, imposed no taxes in lieu of the capital stock taxes imposed by the 1918 Act which accrued and became due and payable prior to July 1, 1922. The error in the court below was in assuming that the

income tax imposed by Section 243 of the 1921 Act was in lieu of the capital stock tax imposed by Section 1000 of the 1918 Act. As by its terms that section imposed no tax in lieu of the tax here in question, Section 1400 (b) of the 1921 Act continued the provisions of Section 1000 of the 1918 Act in force until July 1, 1922, when the corresponding tax under the 1921 Act (*i. e.*, the tax imposed by Section 1000 of that Act) took effect.

CONCLUSION

Because of the importance of the questions here involved in the practical administration of the revenue laws, it is respectfully submitted that the petition for writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
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CLAUDE R. BRANCH,
J. LOUIS MONARCH,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
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C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
E. H. HORTON,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

MAY, 1930.

APPENDIX

The pertinent provisions of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1126) relating to capital stock taxes are as follows:

TITLE X.—SPECIAL TAXES

SEC. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business * * *.

* * * * *

(c) * * * The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: * * *.

The pertinent provisions of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 261, 294, 295, 320, 321), are as follows:

SEC. 243. That in lieu of the taxes imposed by sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows:

(1) In the case of a domestic life insurance company, the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *.

TITLE X.—SPECIAL TAXES

CAPITAL STOCK TAX

SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business * * *.

* * * * *

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business * * *, nor to any insurance company subject to the tax imposed by section 243 * * *.

SEC. 1400. (a) That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in

this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

* * * * *

Title X (called "Special Taxes");

* * * * *

(b) The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act. * * *

The Act of October 1, 1890, c. 1244, Sec. 53, 26 Stat. 567, 624 (U. S. C., Title 26, Sec. 186), provides in part:

That all special taxes shall become due on the first day of July, eighteen hundred and ninety-one, and on the first day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the first day of the month in which the lia-

bility to a special tax commenced to the first day of July following. * * * And it shall be the duty of special tax payers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence, as provided for in section three thousand one hundred and seventy-six of the Revised Statutes.

The Regulations under the 1916, 1918, and 1921 Revenue Acts are as follows:

Regulations 38, promulgated October 19, 1916, under the Revenue Act of 1916, provided—

ART. 3. (a) Section 3237, Revised Statutes, as amended by section 53 of the act of October 1, 1890 (26 Stats., 567), provides "that all special taxes shall become due on the 1st day of July, 1891, and on the 1st day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately from the 1st day of the month in which the liability to a special tax commenced to the 1st day of July following." The capital-stock tax, therefore, which becomes effective January 1, 1917, will be payable in January, 1917, on returns to be made during that month for the six months ending June 30, 1917. In July, 1917, and annually in

July thereafter, returns must again be made and the tax paid for the ensuing fiscal year.

Regulations 38 (Revised), promulgated August 9, 1918, provided:

ARTICLE 1. *Due date.*—The tax became effective January 1, 1917, and is to be paid annually in advance for each year beginning July 1, except as to the first payment for the six months ending June 30, 1917. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see Article 11. No tax is refundable if a corporation ceases to do business during the year.

Regulations 50, promulgated under the Revenue Act of 1918, provided:

ARTICLE 1. *Due date of tax.*—The tax became effective as of July 1, 1918, and is to be paid annually in advance for each year beginning July 1, in lieu of the capital stock tax imposed by the Revenue Act of 1916. The tax for the first year ending June 30, 1919, although necessarily not payable in advance, must be paid upon notice and demand by the collector. See article 111. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commenc-

ing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see article 51. No tax is refundable if a corporation ceases to do business during the year.

Regulations 64, promulgated under the Revenue Act of 1921, provided:

ARTICLE 1. *The law.*—The main provisions of existing law with respect to this tax are embodied in section 1000 of the Revenue Act of 1921, referred to hereinafter as the act.

ART. 2. *Due date of tax.*—The act was approved November 23, 1921, but the tax is effective from July 1, 1922, except upon the incorporation of an individual or partnership business (see art. 32). This is a special tax and like all special taxes is due and payable annually in advance from July 1 of each year. No portion of the tax so paid is refundable to a corporation which ceases to do business during the year.

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No. ~~357~~ 93

In the Supreme Court of the United States

OCTOBER TERM, 1929

NEW YORK LIFE INSURANCE COMPANY, PETITIONER

v.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 851

NEW YORK LIFE INSURANCE COMPANY, PETITIONER

v.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE for the Second District of the State of New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the granting of the petition for a writ of certiorari in the above-entitled case.

The questions raised by the petition are of public importance. The Government is submitting to this Court a petition for a writ of certiorari to review that part of the judgment below which was favorable to the petitioner herein. In order that all of the questions may be considered together, the Government does not oppose the present petition.

THOMAS D. THACHER,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

MAY, 1930.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 93.

NEW YORK LIFE INSURANCE COMPANY, Petitioner,

vs.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK.

No. 160.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER IN No. 93 AND FOR RESPONDENT IN No. 160.

JAMES H. McINTOSH,
Attorney for Petitioner in No. 93
and for Respondent in No. 160,
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Supreme Court of the United States.

OCTOBER TERM, 1930.

NEW YORK LIFE INSURANCE COMPANY, Petitioner, vs. FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK,	No. 93.
FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK, Petitioner. vs. NEW YORK LIFE INSURANCE COMPANY.	No. 160

BRIEF FOR PETITIONER IN No. 93 AND FOR RESPONDENT IN No. 160.

Brief Statement of the Issue.

MAY IT PLEASE THE COURT,—

This is an action to recover capital stock taxes assessed in October, 1922 (R. 38), under Section 1,000 of the Revenue Act of 1918, and paid under protest November 4, 1922 (R. 39), for the years ending June 30, 1919, June 30, 1920, June 30, 1921, and June 30, 1922.

A jury was waived in writing pursuant to the statute (R. 36) and the case tried by the Court upon an agreed statement of facts which it was agreed should be treated as special findings of fact by the Court (R. 36), but which, as a matter of precaution, was put into the form of a bill of exceptions which was settled, allowed and filed as such (R. 36, 174).

The case involves two questions,—

FIRST. How many years' taxes may be collected under a revenue act which was approved February 24, 1919 (U. S. Statutes At Large, Vol. 40, Part I, p. 1152, Section 503) and ceased January 1, 1921, to be effective as to corporations such as the plaintiff (Revenue Act of 1921, U. S. Statutes At Large, Vol. 42, p. 219, Sections 243 and 263)? That is, may taxes be assessed and collected for four years under a statute that was passed February 24, 1919, and ceased to be effective twenty-two months and seven days thereafter? Both courts held, but each on different grounds, that three years was the longest period under which taxes could be collected under the Act; and the court's judgment for the plaintiff for the return of the taxes paid for the year ending June 30, 1922, is the basis of the Collector's Writ of Certiorari in No. 160. The company claims that no capital stock tax was collectable for the year ending June 30, 1921, or for the year ending June 30, 1922, because the Revenue Act of 1921 imposed on the company for 1921 and thereafter a special income tax and expressly stated that the special income tax so imposed was in lieu of the capital stock tax (Revenue Act of 1921, Section 243, U. S. Statutes At Large, Vol. 42, p. 261).

SECOND. Are sums (1) which have been declared as dividends and are payable to policyholders on the anniversary of their insurance during the current year, whether the premiums then due are paid or not (R. 47), and (2) the difference between the amount of premium paid by the policyholder and the actual cost of his insurance as later ascertained, which is "held by the company awaiting apportionment among and payment to its deferred dividend policyholders (R. 42)" surplus or contingent reserves *maintained*

for the general use of the business? Or are these sums liabilities of the company which should be deducted in calculating the net value of its property in ascertaining the sum upon which the capital tax may be assessed? Both courts held that these items were "surplus or contingent reserves maintained for the general use of the business." The company claims they are fixed liabilities of the company payable to its policyholders; that neither of them is maintained for the general use of the business; and that in addition to this the latter item is specifically excluded by that paragraph (b) of the law which says,—

> "(b) In computing the tax in the case of insurance companies such deposits * * * as they are required * * * by * * * contract to * * * hold * * * for payment to or apportionment among policyholders shall not be included."

Official Report of Opinions Delivered.

The Trial Court's opinion is found in 34 Fed. (2d) 945 and in the record commencing at page 27.

The Circuit Court of Appeals' opinion is found in 39 Fed. (2d) 556, and in the record commencing at page 184.

Grounds of the Court's Jurisdiction.

(1) Date of Trial Court's Judgment, June 27th, 1929 (R. 36). Date of Circuit Court of Appeals' judgment March 10th, 1930 (R. 192).

(2) This is a civil suit arising under a law providing for internal revenue, to wit, under the Revenue Act of 1918, entitled "An Act to Provide Revenue, and for other purposes, approved February 24, 1919" (40 U. S. Statutes At Large, 1057), and especially arises under Section 1000, Title X, of that Act, page 1126. The Commissioner assessed the tax for the four years all at one time in October, 1922 (R. 38). The Company paid them at one time, November 4, 1922 (R. 39),

and filed its claim for refund November 23, 1922 (R. 40), which was rejected by the Commissioner March 31, 1923 (R. 39). Thereupon the company commenced this suit April 28, 1923, to recover the taxes so paid (R. 1). The case involves the construction and application of Section 1000 of the Revenue Act of 1918. It is here on Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

(3) The statutory provisions under which jurisdiction is invoked are the Judicial Code, Section 24, Sub-paragraph Fifth, and Section 240 as amended.

The Capital Stock Tax Law.

Section 1000 of the Revenue Act of 1918, with the parts of it important to this case printed in italics, is as follows,—

"Sec. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June thirtieth as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth.

(b) *In computing the tax in the case of insurance companies such deposits* and reserve funds *as they are required by* law or *contract to* maintain or *hold for* the protection of or *payment to or apportionment among policyholders shall not be included.*

(c) *The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in*

business (or in the case of a foreign corporation not engaged in business in the United States) *during the preceding year ending June 30,* nor to any corporation enumerated in Section 231. *The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II,* (The Income Tax) as of the close of the preceding accounting period used by such company for purposes of making its income tax return; Provided, that in the case of a foreign Mutual Insurance Company the tax shall be equivalent to $1 for each $1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return.

(d) Sec. 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section."

STATEMENT OF THE CASE.

I.

The nature of the company and its business, the levy and collection of the taxes in dispute, and the foundation of this action.

1. The plaintiff (herein called the Company) a New York corporation (R. 37), "is a mutual company transacting the business of life insurance on the purely mutual level premium plan * * * and has not, and never has had, any capital stock or stockholders (R. 37)".

2. The Company duly made and filed its capital stock tax return for each of the several years ending June 30, 1919, June 30, 1920, June 30, 1921 and June 30, 1922 (R. 38). Each of these returns showed no capital stock tax payable (R. 38). The Company made its returns in good faith, believing that each of them was full, complete and true (R. 38). Thereafter, and in October, 1922, the Commissioner made a final audit of the Company's returns and calculated its capital stock value for the purpose of the tax for the year ending June 30, 1919, to be $124,500,000; for the year ending June 30, 1920, $117,019,000; for the year ending June 30, 1921, $108,275,000; for the year ending June 30, 1922, $94,134,000 (R. 38); and he assessed a tax thereon accordingly which the Company paid under protest November 4, 1922 (R. 39).

This was a new and, to me at least, a startling disclosure "of the fair average value of the capital stock" of any life insurance corporation, stock or mutual, anywhere, any time. Surely there must be something wrong with these gigantic sums.

3. After paying the taxes under protest November 4, 1922, the Company, November 23, 1922, filed its claim for refund,

which the Commissioner rejected March 31, 1923 (R. 39); and thereupon, April 28, 1923 (R. 1) the Company commenced this suit.

II.

A corporation without capital stock may be taxed on the same basis as corporations with capital stock by imposing the tax on the net value of the property owned by it and used in its business. This is what Congress intended to do by this Act.

The Department itself seems to have regarded the net assets of a corporation to be substantially the measure of the value of the capital stock for the purpose of this tax, for in Regulation 64, Article 15, the Department says,—

> "If the market value of the assets be established, the fair value of the capital stock is held to be not materially less than the fair market value of the net assets."

In fact in the case of the Massachusetts Trusts this Court approved net assets as a proper way of taxing under this law concerns which have no fixed share capital.

Hecht v. *Malley*, 265 U. S. 144.

These trusts had no share capital. The Commissioner assessed them "by taking the fair value of the assets of the association over its liabilities and calling the difference its capital stock." The Court said a tax on its net assets is the way a concern without share capital should be taxed under this law. But, net assets are the same thing as "surplus or contingent reserves maintained for the general use of the business."

Indeed, in an opinion published May 1, 1922, the Solicitor of the Department laid down the following rules for taxing mutual insurance companies under this Act,—

"In determining the amount of the assets upon which the capital stock is to be assessed, there should be deducted from the total assets the following amounts,—

(1) The debt liabilities;

(2) The legal reserves;

(3) Such percentage of the amount of shrinkage from the total value of the assets to the market value of the assets as the amount of the assets in excess of the legal reserves bears to the total assets."

Internal Revenue Bulletin, Vol. 1, No. 18, May 1, 1922, page 37.

Why the Department did not follow the Solicitor's opinion in levying the taxes now in dispute I do not know. When or why the Department between May and October, 1922, so radically changed its mind about how to assess mutual insurance companies under this law I do not know. But the change must have been made during these months, because by following its Solicitor's opinion there would be no surplus or contingent reserves maintained for the general use of the business upon which to assess the tax under the then existing condition of the company's assets and liabilities as shown by its Annual Reports. Therefore, the Commissioner finally concluded to throw out, and he did throw out, from the liability side of the Company's accounts; important items of liabilities, and he thereby derived a taxable sum. But the taxable sum he thus derived is both incorrectly determined, and unreasonable and prohibitive in amount.

III.

How the Commissioner Assessed the Tax.

"Every life insurance company is required by law to file annually in each state where it transacts business, in the office of the Superintendent of Insurance or other corresponding state officer having supervision of insurance, a

report showing, among other things, its income and disbursements for the preceding calendar year, which report must include a statement of its assets and liabilities (R. 45).

"Such reports are required to be made upon uniform blank forms prepared by a committee of, and adopted by, the National Association of Insurance Commissioners, and known as 'Convention Edition Form'" (R. 45).

The Commissioner took this official report and deducted from the market value of the Company's assets as shown by it certain of its liabilities. Exhibit F, commencing at page 95 and concluding on page 114, is the Annual Report from which the Commissioner derived the capital stock valuation for the year ending June 30, 1919, of $124,500,000. For the other years the capital stock value for the purpose of the tax was calculated in the same way from the Annual Reports, Exhibit G commencing on page 115, Exhibit H commencing on page 134, and Exhibit I commencing on page 154. As these exhibits are all alike except as to figures, and as the method of calculating the capital stock value was the same for each year, it will be sufficient to confine our discussion to the year ending June 30, 1919, and the method of getting at what was used as the taxable sum for that year.

Here is his calculation (R. 46),—

"Said Commissioner, in assessing said capital stock tax paid for the fiscal year ending June 30, 1919, deducted from the book value of plaintiff's 'admitted assets' as of December 31, 1917 (shown in line 47, page 4, Exhibit F) (R. 110) . . $934,929,381.52

1. The difference between the book-value and the market-value of said 'admitted assets' $50,291,672.51

2. The amount of the legal reserves as shown by items 7, 8 and 9 on page 5 of Exhibit F 734,510,999.13

3. The total of items 10 to 34, both inclusive, and items 43, 44, 45 and 46, as shown on page 5 of said Exhibit F	25,621,336.39	
4. Exemption	5,000.00	
Total deductions		810,429,008.03
Leaving a difference of		$124,500,373.49

upon which last aforementioned sum said Commissioner levied, assessed and collected said capital stock tax of $124,500 for said fiscal year ending June 30, 1919."

For the convenience of the Court I here copy in full from Exhibit F the several items in the Commissioner's above calculation the numbers only of which he gives in items 2 and 3 of his statement. They are as follows,—

"7. Net reserve (Paid-for basis) (R. 111)	$728,484,785.00	
8. Extra reserve for total and permanent disability and accidental death benefits (R. 112).....	563,494.00	
9. Present value of amounts not yet due on supplementary contracts not involving life contingencies (R. 112)	5,462,720.13	
Total		$734,510,999.13
10. Present value of amounts incurred but not yet due for total and permanent disability benefits (R. 112)	213,892.00	

11.	Liability on policies cancelled and not included in net reserve (R. 112)	467,963.84
12 to 20 inclusive.	Unpaid policy claims (R. 112)	10,350,318.67
21.	Due and unpaid on supplementary contracts *not* involving life contingencies (R. 113).....	13,849.75
22.	Dividends left with the Company to accrue at interest and accumulated interest thereon (R. 113)	2,180,726.52
23.	Premium paid in advance, including surrender values so applied (R. 113)..	1,093,413.43
24.	Unearned interest $3,129,273.54 and rent $7,607.38 paid in advance (R. 113)	3,136,880.92
25.	Commissions due agents on premium notes when paid (R. 113)	24,091.55
26.	Commissions to agents due or accrued (R. 113) ...	9,632.41
28.	Salaries, rents, office expenses, bills and accounts due or accrued (including $3,350.72 accrued charges on deposits) (R. 113)	177,424.46

29.	Medical Examiner's fees $26,908.22; Inspector's fees $5,736.90; and legal fees $4,719.96; due or accrued (R. 113)	37,365.08
30.	Estimated Amount hereafter payable for Fed., State and other taxes based upon the business of the year of this statement (including $41,370.75, accrued taxes on Interest and Deposits) (R. 113) ..	1,957,353.36
34.	Dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums (R. 113)	1,741,222.65
	Total	$25,621,336.39

IV.

Liability items which the Commissioner threw out, thus making a false and fictitious net value of the assets as a basis for the tax.

The Commissioner did not deduct from assets, as he should have done, the following items of liabilities as shown by Exhibit F, commencing at page 113,—

"35.	Dividends declared on or apportioned to *annual dividend* policies payable to policyholders to and including December 31, 1918, whether contingent upon the payment of renewal premiums or otherwise (R. 113)	$12,437,514.00
36.	Dividends declared on or apportioned to *deferred dividend* policies to policyholders to and including December 31, 1918 (R. 114).....	14,123,549.64
37.	Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon *deferred dividend* policies not included in Item 36 (R. 114)	107,041,778.00."

The description of the last above three sums which the Commissioner threw out from the liability side of the Company's report of Assets and Liabilities, is in the language of the form furnished by the Superintendent of Insurance, not the language of the Company.

V.

What were these thrown-out items? Were they "surplus or contingent reserves maintained for the general use of the business" or "reserves the net additions to which are included in net income under the provisions of Title II (The Income Tax)", or were they neither the one nor the other?

They were neither the one nor the other. None of them was maintained for the general use of the business. None of them was reserves. They were each and all over-payments of premiums under a mutual insurance plan in which each insured is entitled to his insurance at cost but pays in advance an estimated sum which is reduced to cost when cost is known by returning the sum the insured paid in excess of what cost turned out to be.

Let us see more fully and precisely just what these several thrown-out items were,—

1. It is the essence of mutual life insurance on the level premium plan that each insured is entitled to receive, and must receive, his insurance at cost (R. 39). Or, as this Court put it in *Penn Mutual* v. *Lederer*, 252 U. S. 523, at page 525,—

> "It is the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the policyholder."

The Company collects in advance an estimated sum or level premium and adjusts this sum to cost when cost is ascertained by the accounting made at the end of each year (R. 39).

2. The Company's charter requires it to ascertain the excess in the premium over the actual cost "as soon as practicable after the 31st day of December each year" (R. 40).

How this accounting is made is shown in the record commencing at page 40. At the conclusion of the accounting the Company's directors pass appropriate resolutions for the distribution of the year's receipts properly to improve the various funds the Company is required to hold for the use of its business. What is left over and above this constitutes the excess in the premium over cost which belongs to the policyholders and must be returned to them. The directors pass appropriate resolutions for returning to the policyholders such excess in the premium in accordance with the terms of their respective contracts (R. 41, Exhibits A, B, C and D, pp. 61, *et seq.*).

3. Two plans exist under which must be returned to the policyholders the sums they paid as premium in excess of what turned out to be the cost of carrying the insurance;—one of these plans is called the annual dividend plan, the other the deferred dividend plan; but under each plan the estimated advanced premium is exactly the same; the insurance cost is exactly the same; the sum to be returned is exactly the same for each insured of the same class and equal expectation of life (R. 42, Paragraph Eleventh).

(a) A mutual life insurance company cannot discriminate between its policyholders. If it did, its business would not be mutual. Besides, the laws of New York and of practically every state provide that "No life insurance corporation doing business in this state shall make or permit any discrimination between individuals of the same class or of equal expectation of life in the amount of payment or return of premium or rates charged for policies of insurance, * * * or in the dividends or other benefits payable thereon, or in any of the terms or conditions of the policy."

New York Insurance Law, Section 89.

(b) Policies on the annual dividend plan provide for paying back to the policyholders each year their over-payments

of premiums (Paragraph Twelfth, R. 42). Policies on the deferred dividend plan provide for holding the over-payments, the amount of which the Company ascertains each year, to the credit of the deferred dividend policyholders as a class, accumulating them at interest, and paying back to each policyholder in accordance with the terms of his contract his share of the accumulated sum on the date named in his policy for doing so, usually twenty years after the insurance took effect (Paragraph Thirteenth, R. 43, *et seq.*).

(c) While the policies on these two plans differ as to the time when the over-payment of premiums shall be returned to the policyholders, they do not differ as to the sum overpaid. "The amount of divisible surplus is the same for each $1,000 of insurance on policyholders of the same age and insurance plan whether the policy is on the deferred or is on the annual dividend plan; that is, if the amount of the determined distributable surplus apportioned to the deferred dividend policyholders as a group were distributed among them for payment during the year as is done in the case of annual dividend policies, each deferred dividend policyholder would receive the same sum for each $1,000 of insurance as each annual dividend policyholder of the same age and insurance plan receives" (R. 42, Paragraph Eleventh).

4. We may now see just what these several items were which the Commissioner threw out of the liability side of the Company's account, namely,—

(a) Item 35 is the excess in the premium over the actual cost which the annual dividend policyholders paid in 1917, the amount of which the company ascertained at the accounting in January, 1918, and which in January, 1918, the Company declared as dividends payable back on the several anniversaries of their policies in 1918 to those respective policyholders from whom it received the over-payments. "These dividends were payable and the plaintiff paid them on the anniversary of each annual dividend policy whether the

premiums then due were paid or not. If the insured was then living it was paid to him; if not, then to the beneficiary named in his policy" (R. 47).

(b) Item 36 is the excess in premium over the actual cost paid by the company's deferred dividend policyholders, with interest accumulations, which, out of the total over-payments held to the credit of the deferred dividend policyholders as a class, was declared as a dividend by the Company's Board of Directors at their January, 1918, meeting, and distributed among and paid to said policyholders during the year 1918 (R. 48).

(c) Item 37 is the amount of the over-payments of premiums made by the Company's deferred dividend policyholders, with interest accumulations, which (R. 49, *et seq.*) the Company credited to such policyholders as a class, and carried to their credit in a special fund called "Interim Accumulation Fund," and is held awaiting apportionment among and payment to its deferred dividend policyholders on the several dates named in their respective policies for such payment. "Said sum of $107,041,778.00 consisted of all the accumulated credits to all the plaintiff's deferred dividend policyholders, except the accumulated credits to the plaintiff's several deferred dividend policies on which a dividend was payable during the year 1918 (Item 36), and was the balance in said accumulated deferred dividend fund after (1) adding interest to the amount of said fund held during the year 1917, and (2) merging therein the amount of the credits to the plaintiff's said deferred dividend policyholders in 1917, and (3) after deducting therefrom the total amount of the dividends payable in 1918 to the plaintiff's deferred dividend policyholders" (R. 50).

Thus was each one of these three items thrown out of the liability side of the Company's account a liability in the strictest sense. No one of them was surplus or contingent reserves *maintained for the general use of the business*, nor could it be. No one of them was reserves at all. They were each and all over-payments of premiums, which the basic

principle of mutual insurance as well as the policy contracts required the company to return to the policyholders. No part of them constituted cost of insurance. The entire amount of each of them was the sum the policyholders paid in excess of cost, to which the company had no right after the amount of the excess was once ascertained. Therefore they could not nor could any one of them be maintained for the general use of the business.

Specification of Errors Relied Upon.

The Company relies upon each of the following several assignments of error (R. 176),—

First. The Court erred in finding and adjudging that the plaintiff was liable for the payment of a capital stock tax for the year ending June 30, 1919.

Second. The Court erred in not deducting from the market value as of December 31, 1917, of the plaintiff's total admitted assets such deposits or reserve funds as the plaintiff was required by contract to hold for apportionment among and payment to its policyholders, to wit, the sum of $107,041,778.

Third. The Court erred in not deducting from the market value as of December 31, 1917, of the plaintiff's total admitted assets the dividends declared on deferred dividend policies and payable absolutely, to wit, the sum of $14,123,549.64.

Fourth. The Court erred in not deducting from the market value as of December 31, 1917, of the plaintiff's total admitted assets the dividends declared on annual dividend policies and payable absolutely, to wit, the sum of $12,437,514.

Fifth. The Court erred in not finding and adjudging that the plaintiff was entitled to refund of the entire capital stock paid by it for the period ending June 30, 1919.

Sixth. The Court erred in dismissing the plaintiff's complaint as to its First Cause of Action and in adjudging that the plaintiff was not entitled to the refund of any sum on account of said capital stock tax paid for the year ending June 30, 1919.

Seventh. The Court erred in finding and adjudging that the plaintiff was liable for the payment of a capital stock tax for the year ending June 30, 1920.

Eighth. The Court erred in not deducting from the market value as of December 31, 1918, of the plaintiff's total admitted assets such deposits or reserve funds as the plaintiff was required by contract to hold for apportionment among and payment to its policyholders, to wit, the sum of $100,893,328.

Ninth. The Court erred in not deducting from the market value as of December 31, 1918, of the plaintiff's total admitted assets the dividends declared on deferred dividend policies and payable absolutely, to wit, the sum of $19,000,738.13.

Tenth. The Court erred in not deducting from the market value as of December 31, 1918, of the plaintiff's total admitted assets the dividends declared on annual dividend policies and payable absolutely, to wit, the sum of $13,636,876.

Eleventh. The Court erred in not finding and adjudging that the plaintiff was entitled to refund of the entire capital stock tax paid by it for the period ending June 30, 1920.

Twelfth. The Court erred in dismissing the plaintiff's complaint as to its Second Cause of Action and in adjudging that the plaintiff was not entitled to the refund of any sum on account of said capital stock tax paid for the year ending June 30, 1920.

Thirteenth. The Court erred in finding and adjudging that the plaintiff was liable for the payment of a capital stock tax for the year ending June 30, 1921.

Fourteenth. The Court erred in not deducting from the market value as of December 31, 1919, of the plaintiff's total admitted assets such deposits or reserve funds as the plaintiff was required by contract to hold for apportionment among and payment to its policyholders, to wit, the sum of $88,157,964.

Fifteenth. The Court erred in not deducting from the market valne as of December 31, 1919, of the plaintiff's total admitted assets the dividends declared on deferred dividend policies and payable absolutely, to wit, the sum of $18,194,897.56.

Sixteenth. The Court erred in not deducting from the market value as of December 31, 1919, of the plaintiff's total admitted assets the dividends declared on annual dividend policies and payable absolutely, to wit, the sum of $13,850,878.

Seventeenth. The Court erred in not finding and adjudging that the plaintiff was entitled to refund of the entire capital stock tax paid by it for the period ending June 31, 1921.

Eighteenth. The Court erred in dismissing the plaintiff's complaint as to its Third Cause of Action and in adjudging that the plaintiff was not entitled to the refund of any sum on account of said capital stock tax paid for the year ending June 30, 1921.

BRIEF OF THE ARGUMENT.

I.

No Capital Stock Tax for the year ending June 30, 1921, because the Revenue Act of 1921 imposed a special income tax on life insurance for 1921 and thereafter in lieu of the Capital Stock Tax.

Section 243 of the Revenue Act of 1921 provided as follows,—

> "That in lieu of the taxes imposed by Sections 230 (The Income Tax on Corporations Generally) and 1000 (The Capital Stock Tax) and by Title III (War Profits and Excess Profits Tax) there shall be levied, collected and paid for the calendar year 1921 and for each taxable year thereafter, upon the net income of every life insurance company a tax as follows:"

And then the Act goes on to impose on life insurance a special income tax for 1921, and for each taxable year thereafter, which is to be in lieu of the capital stock tax for 1921 and of the other Federal taxes described.

This special income tax for 1921 and subsequent years was intended to impose on life insurance companies a tax the amount of which would be at least equal to all the taxes they would have been required to pay if instead of being subjected to this special income tax they had been subject like other corporations to the income tax on corporations generally, plus the capital stock tax, plus the war profits and excess profits tax. Indeed, in reporting this special income tax for passage the Congressional Committee said, after explaining it, "The new tax will yield a larger revenue than the taxes which it is proposed to replace."

Under this plain provision of Section 243 of the Revenue Act of 1921 is it according to law to impose on these cor-

porations for 1921 a capital stock tax when Congress that year imposed upon them a special income tax which was to be in lieu of the capital stock tax? Or is it fair to make them pay a capital stock tax for that year when the special income tax which Congress imposed upon them for 1921 in lieu of the capital stock tax for 1921 was designed to "yield a larger revenue than the taxes which it is proposed to replace"?

Both courts, however, have held that, notwithstanding what the Act of 1921 so plainly says, the Company is liable for the tax for the year ending June 30, 1921; but they so held on different and inconsistent grounds, and neither of them on any ground that I think is tenable.

1. The Trial Court held that the company was liable for the 1921 tax for two reasons,— First, because the express repeal of the 1918 capital stock tax by the 1921 Act did not take effect until January 1, 1922; and Second, because the 1921 Act did not become a law until November 23, 1921, and that meantime "on July 1, 1921, plaintiff came under an absolute liability to pay taxes for the privilege theretofore exercised" (R. 32).

First. As to the express repeal of the 1918 capital stock tax by the 1921 Act not taking effect until January 1, 1922.

(a) It is true Section 1400 of the Act of 1921 says that the repeal of the capital stock tax provisions of the Act of 1918 shall take effect on January 1, 1922. But has not Congress power to limit the application of a statute without formally repealing it? And when, as here, the intent of Congress is so clearly expressed, shall we say that the Act cannot have the effect intended because the old law was in force for some purpose and not formally repealed?

(b) The formal repeal of the 1918 Capital Stock Tax law is wholly immaterial to the merits of this case.

Section 243 of the Act of 1921 is a part of the income tax title of the Act of 1921. About the income tax, Section 263

of the 1921 Act says,— "This title (The Income Tax) shall take effect as of January 1, 1921."

So that on January 1, 1921, the special income tax became effective and was in lieu of the capital stock tax and of the other forms of taxation referred to in Section 243.

(c) If, however, the repeal of the 1918 Capital Stock Tax law were material here, the provisions of the Act of 1921 constitute a repeal of it as to life insurance companies.

The Act of 1921 covers the whole field embraced by the Act of 1918. It imposes an income tax, a war profits and excess profits tax, an estate tax, a capital stock tax, and the other forms of tax that the Act of 1918 imposes, and contains, without any change, most of the provisions of the 1918 Act. What new legislation this 1921 Act contains is new legislation only in so far as in substance or operation it differs from the prior law. Where, in such case, the new legislation, as here, prescribes a new method of taxing a class of corporations, the latter act repeals by implication the old law.

U. S. v. *Tynen,* 11 Wall. 88;
King v. *Cornell,* 106 U. S. 395;
Tracy v. *Tuffly,* 134 U. S. 206;
Fisk v. *Henarie,* 142 U. S. 459;
District of Columbia v. *Hutton,* 143 U. S. 18;
Gibson v. *U. S.,* 194 U. S. 182;
Rogers v. *Nashville, C. & St. L. Ry. Co.,* 91 Fed. 299;
Great Northern v. *U. S.,* 155 Fed. 945.

In the leading case of *U. S.* v. *Tynen,* 11 Wall. 88, frequently cited and always followed on this subject, the Court said, at page 92,—

> "When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two acts are repugnant in any of their provisions, the latter act, without a repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even

> where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

In *King* v. *Cornell*, 106 U. S. 395, MR. CHIEF JUSTICE WAITE said,—

> "While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal."

In *Rogers* v. *Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, in an opinion by CIRCUIT JUDGE LURTON, in which CIRCUIT JUDGE TAFT and DISTRICT JUDGE SEVERENS concurred, the Court said,—

> "Undoubtedly the general rule is that, when there are two acts upon the same subject, effect should be given to both if possible. This is impossible, if the two acts are repugnant in any of their provisions. The new law must, therefore, operate as a repeal of the old law, without regard to a repealing clause, to the extent of the repugnancy. Neither is it always essential that there shall be an express repugnancy between the new and old statutes. If the latter law covers the whole field embraced by the earlier act, and includes any new legislation tending clearly to indicate that the new statute was intended to take the place of the first act, it will be treated as repealing by implication the older provisions upon the same subject. It will not be presumed that the legislature intended two distinct enactments upon the same subject."

It cannot be questioned that the Act of 1921 covers the whole field embraced by the Act of 1918. It includes new legislation tending clearly to indicate that the Act of 1921 was enacted to take the place of the Act of 1918. It imposed on life insurance companies a special income tax for 1921

in lieu of the capital stock tax for 1921; the income tax provisions of the Act went into effect January 1, 1921; hence, clearly, under the authorities, the income tax provisions of the Act of 1921 superseded and in effect repealed, as to life insurance companies, all the other laws referred to in Section 243 imposing Federal taxes.

Second. As to the 1921 Act not becoming a law until November 23, 1921, and meantime the company, on July 1, 1921, becoming under an absolute liability to pay a tax for the privilege theretofore exercised.

(a) The 1921 Act did not become a law until November 23, 1921, but its income tax provisions took effect as of January 1, 1921. Therefore the effect of the Act was just the same as if it had been passed and approved January 1, 1921, or at an earlier date to take effect January 1, 1921.

Stockdale v. *Insurance Company,* 21 Wall. 323;
Brushaber v. *Union Pacific,* 240 U. S. 1;
U. S. v. *McHatton,* 266 Fed. 602.
Untermeyer v. *Anderson,* 276 U. S. 440;
Swab v. *Doyle,* 269 Fed. 325.

(b) Moreover, the 1921 Act in plain terms says that the capital stock tax provisions of the 1918 shall not be in effect as to life insurance on or after January 1, 1921.

Section 1400 (b) of the Act of 1921 says,—

> "In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act."

The 1921 capital stock tax here in dispute was imposed, if at all, by that part of the Revenue Act of 1918 known as Section 1000. The special income tax imposed by the Act of 1921 on life insurance companies was in lieu of the tax

imposed by Section 1000. Hence, as to life insurance companies, the provision of the 1918 Act imposing a capital stock tax on them only remained in force until the corresponding tax under the 1921 Act, namely, the special income tax on life insurance companies, took effect. This special income tax on life insurance under the 1921 Act took effect January 1, 1921. Therefore by the plain terms of the 1921 Act the capital stock tax provisions of the 1918 Act were not in effect as to life insurance companies after January 1, 1921.

(c) But the Trial Court says (R. 32),—

> "On July 1, 1921, plaintiff came under an absolute liability to pay taxes for the privilege theretofore exercised (that is, the privilege of doing business in a corporate capacity for the year ending June 30, 1921). A statute enacted after that date might admittedly relieve it of this liability, but such a Congressional intent is not lightly to be presumed."

There are several answers to this,—

(1) The plaintiff's liability for the capital stock tax for the year ending June 30, 1921, was not absolute on July 1, 1921; it was conditional,—conditional on Congress not passing a new act imposing on life insurance companies another tax in lieu of that tax. But Congress did pass such an act and said the new tax should be in lieu of the capital stock tax and other taxes for the year 1921. Thereupon, this conditional liability became no liability.

(2) There is no virtue in the date, July 1, 1921, on which the Court says the plaintiff's liability for this tax became absolute, because the 1921 Act expressly provides for all such cases.

Section 200 of the 1921 Act relating to the income tax says,—"The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921, *or any fiscal year ending during the calendar year of 1921.*" And that section

defines fiscal year as a "period of twelve months ending on the last day of any month other than December."

Suppose the fiscal year of an income tax payer ended June 30, 1921,—Would he be taxed for that year under the law of 1918? Would it be proper to say of him that he was taxed under the 1918 Act because when his fiscal year expired his net income for the year was thereby fixed, and he "came under an absolute liability to pay" an income tax under the 1918 Act? His liability for an income tax for the year ending June 30, 1921, under the 1918 Act, was, like the Company's liability for the tax in question, not absolute but conditional on the Congress not passing another act which would tax him for that year under the new Act.

Kentucky Jockey Club v. *Lucas*, 14 Fed. (2d) 539.

(3) But the Trial Court says, a statute enacted after the tax for the year ending June 30, 1921, accrued might relieve the taxpayer from such tax, but the intent to do so is not lightly to be presumed (R. 32).

We are not asking the Court to presume, lightly or otherwise, that the 1921 Act relieves the plaintiff from liability for the capital stock tax for the year ending June 30, 1921. We merely ask the Court to take the 1921 Act for what it plainly says. We ask the Court to hold that the special income tax on life insurance companies imposed for 1921 by the Act of 1921 was in lieu of the capital stock tax for 1921, or for any fiscal year ending in 1921, because the statute plainly says so. We ask the Court to hold that Section 1000 was not in effect as to life insurance companies, because the 1921 Act imposed a special income tax in lieu of the capital stock tax; that this special income tax went into effect January 1, 1921 and therefore that Section 1000 did not remain in force as to life insurance companies after the special income tax imposed by the Act of 1921 took effect January 1, 1921.

2. The Court of Appeals holds the company liable for the year ending June 30, 1921, not for any of the reasons stated

by the Trial Court, but, contrary to the opinion of the Trial Court, because the taxes "were levied in advance" (R. 191), the Department having so construed the law, and the taxes being special taxes which are "generally payable in advance under Section 186, Title 26, of the United States Code" (R. 191).

(a) The Trial Court says, "The capital stock tax payable on July first of any year was for the privilege of doing business during the year just elapsed, as is shown by the fact that corporations which had not engaged in business during the preceding year were not subject thereto, even more clearly than by the fact that its measure was the fair average value of the capital stock during the preceding year."

This seems to me to be the plain meaning of the law. The tax is an excise tax upon the privilege of doing business in a corporate capacity during the preceding year. A corporation not engaged in business during the preceding year is not taxed. A corporation commencing business, say, July 1, 1918, would then have no tax to pay. If, however, it continued business for a year then and only then would it be liable for the tax. And why? Because it had done business in a corporate capacity during the year. This was a valuable privilege and therefore taxable; and the measure of the tax was "the fair average value of its capital stock" during the period it enjoyed the taxable privilege, namely, the preceding year.

This is the only construction that can give meaning and practical effect to that clause of the law which says,— "The taxes imposed by this Section shall not apply in any year to any corporation which was not engaged in business * * * during the preceding year ending June 30th." It is the only rational construction to justify taking as a measure of the tax the fair average value of its capital stock for the preceding year. Why take the fair average value of the capital stock for the year ending June 30, 1919, as a measure of the value of exercising a corporate franchise for

the next year, the year ending June 30, 1920? There may be no relation, indeed we are now too well seeing there is no necessary relation, between the two; but between the fair average value of the capital stock during any one year and the value of doing business in a corporate capacity that same year there is a real and intimate relation.

(b) But the Appellate Court says the Department construed the law as making the tax payable in advance.

(1) Our first answer to this is, that the Department did not and could not construe the law as making the tax payable in advance by mutual insurance companies because the law had no application to them until February 24, 1919, the date of the approval of the Act, nearly eight months after July 1, 1918, the date the tax became effective.

(2) The second answer is, that there is no ambiguity in the law if meaning and effect are to be given to that part of it which says, "The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business * * * during the preceding year ending June 30th", and requires the amount of the tax to be measured by "the fair average value of the capital stock for the preceding year". It is only when a law is ambiguous that the Department's construction may have weight.

St. Paul &c. R. Co. v. *Phelps,* 137 U. S. 528;
Houghton v. *Payne,* 194 U. S. 88;
U. S. v. *Mo. P. R. Co.* 278 U. S. 269.

(3) And finally, if, as the Trial Court held, the tax payable in "any year was for the privilege of doing business during the year just elapsed", the Department could not by construction make it payable for some other year. That would be legislation, not construction.

(c) The Appellate Court's other reason for holding the tax payable in advance is, that it is a special tax and special taxes are generally payable in advance under Section 186, Title 26, of the United States Code.

The origin and history of Section 186 of Title 26 of the United States Code shows that Section 186 has no application to a special excise tax such as this.

Section 186 had its origin in the Revenue Act of 1864. *13 Statutes at Large*, Chapter 173, p. 223.

Section 72 of the 1864 Act imposed an annual license tax on a vast list of trades, businesses and professions, such as bankers, wholesale dealers, retail dealers, brokers, pawn brokers, hotels, peddlers, butchers, lawyers, and many others. These license taxes were payable annually in advance on May 1st. They were all capable of being paid in advance because the statute fixed the amount of each of them at a specific sum, such as $10, $50, $100 or other exact sum. The amount of no one of them was to be determined by a valuation and assessment after the taxpayer had carried on the trade, business or profession for a year, nor was it based on the value of the property in use for the year or on any other measures depending upon the year's experience.

The use of the word license in the 1864 Act created confusion because the state laws prohibited the carrying on of some of the occupations the Federal Government licensed, and some licensees thought that because they held a license from the Federal Government they had a right to pursue the occupation in spite of the prohibition contained in the state laws.

License Tax Cases, 5 Wall. 462.

Hence, in passing the Revenue Act of 1866 in lieu of the Revenue Act of 1864, Congress dropped the word "license" and substituted for it the phrase "special tax".

Revenue Act of 1866, 14 Statutes at Large, Chapter 184, page 198.

This was substantially all the change the 1866 Act made in this feature of the law. The special taxes in the 1866 Act were license taxes in the 1864 Act, possessing the same characteristics.

Section 71 of the Act of 1866 prohibited the carrying on of any trade, business or profession upon which a special tax was imposed before paying the tax. Section 74 provided that special taxes should "become due on the first day of May in each year, or on commencing any trade, business or profession upon which such tax is imposed."

Sections 71 and 74 of the Revenue Act of 1866 were carried into the Revised Statutes as Section 3232, which prohibits engaging in any business upon which a special tax was imposed without first paying the special tax, and as Section 3237, which provides that "all special taxes shall become due on the first day of May in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, in the latter case it shall be reckoned proportionately from the first day of the month in which the liability for a special tax commenced to the first day of May following."

Section 53 of the Revenue Act of 1890 (26 *Statutes at Large*, page 567), amended Section 3237 of the Revised Statutes by changing the due date of the special taxes to which it applied from May 1st to July 1st. This Section 53 of the Revenue Act of 1890 is now Section 186 Title 26 of the United States Code.

Thus the origin and history of Section 186 of Title 26 of the United States Code clearly shows that Section 186 applies, and was intended to apply, only to such special taxes as are in the nature of a license tax, the amount of which is definitely fixed by law, and capable of being paid in advance "or on commencing any trade or business upon which such tax is imposed." Clearly the section has no application to a special excise tax such as the corporation excise tax imposed by the Revenue Act of 1909, or such as this special excise tax which is not a sum definitely fixed by law, like a license tax, capable of payment in advance "or on commencing any trade or business upon which such tax is imposed", but is an indefinite sum, the amount of which is determined after the taxpayer has been in business for a year, by a valu-

ation and an assessment of the fair average value of the capital used in the business for the preceding year.

Thus none of the grounds are tenable upon which the Company has been held liable for the year ending June 30, 1921. Besides, why not take the law as Congress gives it to us? The law says the special income tax on life insurance companies for 1921 shall be in lieu of the capital stock on them for 1921. It also says that it means by 1921 not merely the calendar year, but any fiscal year ending in 1921. Why dispute about a thing that is so plain?

II.

Where a corporation has no capital stock the 1918 Act taxes as capital stock the value of its assets over its liabilities, and as applied to this case insurance companies are no exception to this rule.

1. The Massachusetts Trusts had no capital stock. They were unincorporated associations in the nature of pure trusts or partnerships. The Commissioner taxed them under the Act "by taking the fair value of the assets of the association over its liabilities and calling the difference its capital stock", and this Court said this was the proper way to tax them.

Hecht v. *Malley*, 265 U. S. 144.

MR. JUSTICE SANFORN in delivering the opinion of the Court in that case said, at page 163,—

> "We think that in the Act of 1918, in which the tax upon an association is based upon the average value of its 'capital stock', including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted in their entirety, and, in the absence of a fixed share capital, as equivalent to the capital invested in the business, that is, the net value of the

property owned by the association and used in its business. As was said by the Circuit Court of Appeals, *the phrase in the Statute as to 'including surplus and undivided profits puts beyond doubt the question of the congressional intent to measure this tax by business and financial realities, not by bookkeeping forms or mere names.'* And this construction is in harmony with the provisions as to the excise tax on a foreign association, which is fixed upon the value 'of the capital actually invested in the transaction of its business in the United States.'

"We therefore conclude that the Crocker Association was also subject to the tax, and that this was properly *measured by the Collector by the net value of its property*—no question being made as to the correctness of his valuation."

2. This rule, applied in the case of the Massachusetts Trusts, seems to have been substantially the rule the Solicitor of Internal Revenue thought should also be applied in taxing mutual insurance companies as is shown by his opinion dated May 1, 1922, quoted from on page 8 of this brief, relating to the method of taxing mutual insurance companies.

Internal Revenue Bulletin, Vol. 1, No. 18, May 1, 1922, page 37.

3. Mutual insurance companies are no exception to the rule that applies to the Massachusetts Trusts, except to the extent that the clause, "and any reserves the net additions to which are included in net income under the provisions of Title II", constitutes an exception.

But this clause about reserves is not material to this dispute, which relates only to dividends declared, and to overpayments of premiums which belong to the policyholders and which the Company's contracts require it to hold for apportionment among and payment to the class of policyholders from whom it received them.

Both Courts held the company liable on the ground that these sums in dispute were surplus or contingent reserves maintained for the general use of the business.

Reserves in life insurance are computed or estimated sums which are set aside to liquidate future unaccrued and contingent claims, and claims accrued but contingent and indefinite as to amount or time of payment.

In *Maryland Casualty Co.* v. *U. S.*, 251 U. S. 342, the Court defines reserves at page 350 as follows,—

> "The term 'reserve' or 'reserves' has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside, 'reserved', as a fund from which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time for payment."

The items referred to in the part of the clause commencing "any reserves the net additions to which, &c.", were all in dispute in *New York Life* v. *Edwards*, 271 U. S. 108, decided in 1926, and are the several items on the liabilities side of the Company's Annual Report (R. 112, 114) which are numbered respectively 8, 10 and 44.

4. The Commissioner's method of calculating the taxable sum indicates that he had in mind the net asset rule applied in taxing the Massachusetts Trusts. Here he took the total value of the assets. But when he came to deduct the total amount of the liabilities he saw that if he deducted all the liabilities his result would agree with the Company's return. So after long hesitation he concluded to throw out these three important items of liabilities, and thus got the enormous sum of $124,500,000 as the fair average value of the capital stock for the year ending June 30, 1919.

If the Commissioner in taxing the Massachusetts Trusts had found that the assets of one or more of them did not exceed its liabilities would the Court have approved throwing out important items from the liabilities side of the account in order to derive a taxable sum?

And then, too, the unthinkable result he thus derived. All large New York stock companies have lately mutualized. Suppose the stockholders of any one of these companies had surrendered their stock on any such basis of valuation as the Commissioner took for the imposition of this tax, what in the world would have happened? Why, the largest of all life insurance companies, the Metropolitan Life, in mutualizing in 1914 valued all its shares of stock at $6,000,000 and no more; and this is the total sum the stockholders of that great company voluntarily accepted for the surrender of all their shares.

III.

Are dividends declared, payable, and paid on the next anniversary of the policies to which they belong, surplus or contingent reserves maintained for the general use of the business?

"Maintained for the general use of the business" is the important qualifying portion of this clause of the law which was intended to define what surplus or contingent reserves Congress meant, and to harmonize Clause (c) with Clause (b). Clause (b) referred to what is popularly called surplus, which the company is required by contract to hold for apportionment among and payment to certain policyholders. Hence this phrase in Clause (c), "maintained for the general use of the business", serves the double purpose,—(1) of showing what should be taxed in a mutual company, and (2) of harmonizing Clause (c) with Clause (b).

And yet both courts, in sustaining the Commissioner's calculations, have either ignored or confused the meaning of this important limiting phrase, "maintained for the general use of the business."

Are dividends declared maintained for the general use of the business? Were they a liability that could be thrown out in calculating the net value of the company's assets? There can be only one answer to these questions; the answer is obvious. From the time these dividends were declared they became a fixed and irrevocable debt liability of the Company which it was bound to pay, did pay, and could not have gotten out of paying if it had tried. There is no theory upon which these dividend items can be thrown out in calculating the amount of the Company's surplus or contingent reserves *maintained for the general use of the business.*

Taylor on Corporations (5th Ed., Sec. 568);
Meacham on Corporations (Vol. 2, Sec. 1358);
Thompson on Corporations (Vol. 2, Sees. 2131 and 2896);
Morawetz on Corporations (Vol. 1, Sec. 445);
Marshall on Corporations (Sec. 283);
Fletcher's Cyclopedia on Corporations (Vol. 2, 1924 Supplement, p. 776);
U. S. v. *Ginsberg,* 278 Fed. 336;
Staats v. *Biograph Company,* 236 Fed. 454;
Hopper v. *Sage,* 112 N. Y. 530;
Beers v. *Bridgeport,* 42 Conn. 17;
King v. *Patterson,* 39 N. J. L. 82;
Armant v. *New Orleans,* 7 So. (La.) 35.

IV.

Are over-payments of premiums, which the company's contracts require it to hold for apportionment among and payment to the class of policyholders from whom it received them and to whose credit it holds them, surplus or contingent reserves maintained for the general use of the business?

This is the sum described in Item 37 of the Company's Annual Report, Exhibit F, page 114, as,—

> "Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend polices, not included in Item 36 ..... $107,041,778.",

and a like Item 37, but less in amount, for each subsequent year (Exhibit G, p. 133, Exhibit H, p. 153, Exhibit I, p. 173,) which the Commissioner threw out of the liability side of the account in assessing this tax.

This sum is described as above in the Company's Annual Reports which are in the language of the Superintendent of Insurance, but in its accountancy system it is called (R. 50) "The Interim Accumulation Fund". Both designations, however, mean the same fund, namely, the sums paid by the Company's deferred dividend policyholders each year in excess of the cost of carrying their insurance for that year, the amount of which the company ascertained at the end of each year at the same time and in the same way that it ascertained the amount of the over-payments made by its annual dividend policyholders; and which, in amount, was the same sum (R. 42) "for each $1,000. of insurance on policyholders of the same age and insurance plan, whether the policy is on the deferred or on the annual dividend plan", but which, instead of each year returning the over-payments to the policyholders who made them, as the Company did in

the case of its annual dividend policies, the Company each year passed as a whole, into this special fund and carried as a credit to its (R. 50) "deferred dividend policyholders with interest accumulations added thereto," and held it, as its contracts required it to do, for apportionment among and payment to its deferred dividend policyholders in accordance with the terms of their several policy contracts and on the respective dates named therein for making such payments (R. 42, *et seq.*).

1. The first and controlling reason, if there were no other, why this sum should not be used in computing the tax is, because the Act itself says so in plainest terms. The Act says,—

> "(b) In computing the tax in the case of insurance companies *such deposits* and reserve funds *as they are required by* law or *contract to* maintain or *hold for* the protection of or *payment to or apportionment among policyholders shall not be included.*"

2. But both Courts say Clause (b) of the Act applies to stock companies only, not to mutual companies.

Why? The Act does not say so. The Act says,—"In computing the tax in the case of insurance companies", without any exception or word of limitation. The Court, however, in order to reach the conclusion the Court reached, amends the Act. The Court ingrafts into it an exception that is not there. By construction the Court gives the Act the meaning it would have if instead of saying what it plainly says, it said, "In computing the tax in the case of insurance companies, *except mutual companies.*" This the Court cannot do. It is amendment, not construction; a legislative, not a judicial function.

Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602;
Bate Refrigerator Co. v. *Sulzberger*, 157 U. S. 1;
Commr. of Immigration v. *Gottlieb*, 265 U. S. 310;

United States v. *Missouri Pacific*, 213 Fed. 169;
Atlantic Coast Line v. *United States*, 168 Fed. 175;
Lynch v. *Alworth-Stephens Co.*, 294 Fed. 190;
Omaha Water Co. v. *City of Omaha*, 147 Fed. 1;
Wrightman v. *Boone County*, 88 Fed. 435.

Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602, involved the question of the taxability under the Income Tax Law of 1913 of "income held and accumulated by a trustee for the benefit of unborn and unascertained persons." The Commissioner claimed that Congress intended by the Act of 1913 to tax citizens everywhere on income from every source, less allowed deductions; hence that the income of the trust estate in question was taxable whether the beneficiaries of the trust were unborn and unascertainable or not. In answer to this the Court said on page 605 that the Commissioner of Internal Revenue had ruled that in such case, when the beneficiary was not *in esse* and the income of the estate is retained by the fiduciary, the income was taxable and the fiduciary should pay it. But in overruling the Commissioner the Court said,—"This seems to us to graft something onto the statute that is not there. It is amendment, not construction." The Court further said that in the Act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries, or for the estate, or for the trust, but Congress did not do so; and hence that the income was not taxable.

So here, it would have been easy for Congress to have excepted mutual insurance companies from paragraph (b), if Congress had intended to do so; but it did not do so.

In *Wrightman* v. *Boone County*, 88 Fed. 435 (C. C. A. 8th Circuit), the question was, whether or not a statute of Arkansas which prohibited the revival of judgments unless *scire facias* was issued therefor within ten years from the rendition of the judgment, applied to judgments rendered before its passage or only to judgments rendered after its passage; and because the act contained no words limiting its

application to judgments rendered after its passage, the Court held that it applied to judgments regardless of the date when rendered. The Court said,—

> "The legislature had the power to except from this broad prohibition judgments rendered before the enactment of the law, but it did not do so. The fact that it failed to make any exception raises a strong presumption that it intended to make none, and brings any exception that a court might be disposed to make into the category of judicial legislation."

And so here, Congress had power to except mutual insurance companies from the benefits of clause (b) in the act in question. But it did not do so. The fact that it did not do so shows that it did not intend to do so. Hence for the Court now, by construction, to inject into the statute an exception that Congress did not put there puts the case into the forbidden category of judicial legislation.

3. But the Appellate Court says (R. 189) "(c) was certainly intended to be the sole measure of the tax on mutual companies."

Again why? To be sure, the provision about taxing mutual insurance companies was put into (c) as an amendment;—but did this make it stand out alone as a separate method of taxation, independent of the other provisions of the section of which it forms a part? That is the function of a separate act, complete in itself, not of an amendment. The very idea of amendment is some alteration which becomes a part of the thing altered with the same force and effect as if the altered thing originally so read. The amended Act, like any other Act, is to be construed as a whole, its provisions harmonized if possible, and meaning and effect given to every part of it.

The claim, therefore, that the amendment is to be construed as if it stood alone is not good; nor will it justify a judicial amendment of clause (b) by inserting in it after the words "in the case of insurance companies" the words "except mutual insurance companies". If Congress had wanted

that exception there it would have put it there. For the Court to insert it is not merely judicial amendment but is a reflection on Congress, attributing to it a degree of carelessness the time and trouble it takes in framing these bills will not justify.

4. Let us now, for the purpose of the argument, assume that clause (b) does not mean what it says, does not apply to mutual insurance companies, is the case different? That is, is the sum in question "surplus or contingent reserves *maintained for the general use of the business*"?

(a) The laws of some of the states furnish one answer to this. For example, here is an old law of Minnesota, still in force, which shows that this sum is not and cannot be maintained for the general use of the business,—

> "Every life insurance company doing business in this state conducted on the mutual plan or in which policyholders are entitled to share in the profits or surplus shall annually apportion to such policies as a class the amount of surplus so ascertained, and carry the amount of such apportioned surplus, plus the actual interest earnings and accretions of such fund, as a distinct and separate liability to such class of policies on and for which the same was accumulated, *and no company shall or any of its officers shall be permitted to use any part of such apportioned surplus fund for any purpose whatsoever other than the express purpose for which the same was accumulated.*"
>
> *Mason's Minnesota Statutes*, 1927, Vol. 1, Sec. 3394.

(b) But the conclusive answer lies in the fundamental nature of life insurance as done on the mutual, level premium plan,—the source from which this sum comes, the persons to whom it must go, and why.

I need not say, this Court has said as clearly and forcibly as it can be put,—

"It is the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the policyholder."

Penn Mutual v. *Lederer*, 252 U. S. 523, 525.

Besides, we have here agreed (R. 39) that "it is the essence of mutual life insurance on the level premium plan that each policyholder is entitled to receive his insurance at cost; the company collecting its estimated or level premiums in advance and adjusting the actual cost afterwards when cost is known."

The Table Rate of Premium, or level premium (R. 40) "is the estimated sum named in the policy as premium to be paid in advance and adjusted to cost when cost is known."

An account is taken at the end of each year to find out what cost was for the year and how much each policyholder paid for the year in excess of cost (R. 42). The over-payment thus each year ascertained (R. 42) "is the same for each $1,000. of insurance on policyholders of the same age and insurance plan whether the policy is on the deferred or is on the annual dividend plan."

The over-payments of the annual dividend policyholders were paid back to them each year as a dividend (R. 47). The over-payments of the deferred dividend policyholders were credited to the deferred dividend policyholders as a class (R. 50) and (R. 42) held by the Company awaiting apportionment among and payment to its deferred dividend policyholders on the several dates named in their respective policies for paying a dividend, not maintained for the general use of the business.

Can this Court say, can anyone fairly say, that this sum in excess of the cost of insurance, so acquired by the company, so held by it, which the essence of mutual insurance as well as its contracts require the Company to return to the class of policyholders from whom it received it, is "surplus or contingent reserve *maintained for the general use of the business?*"

It is not maintained for the general use of the business; it is maintained for a specific purpose. It is not insurance cost *which alone a mutual company can maintain for the general use of its business;* it is a sum received in excess of insurance cost. It was not paid by the policyholder nor received by the company with the understanding, intention or expectation that it would be maintained for the general use of the business; it was paid and received because the successful transaction of the business required payment in advance. Hence they made a liberal estimate of the sum to be paid in advance until cost could be known, with the understanding, intention, expectation, legal and contractual obligation that the over-payment would be returned to the policyholder,—not maintained for the general use of the business. The nature of the sum is such that in the event of the insolvency or liquidation of the Company the policyholders whose over-payments made it up would be preferred creditors of the Company for the entire sum.

It is no answer to this to say that there will be no surplus or contingent reserves maintained for the general use of the business upon which to impose a tax if these items are treated as their true nature demands and the law authorizes and requires. The Company is not responsible for the extraordinary death losses that result from the epidemic that raged during some of the years in question, nor for the business conditions that depressed the value of its securities after the war. Besides, is it right that by the methods here used the Company must pay a tax based on a capital stock valuation many, many times in excess of any capital stock valuation ever before thought of for such a corporation?

In mutualizing, the Metropolitan's stockholders, as already stated, surrendered their stock for $6,000,000; the Equitable's stockholders surrendered their stock for $3,453,900. If in assessing this tax the Commissioner had recognized the plain fact that the Company had no surplus or contingent reserves maintained for the general use of the business, if he had been satisfied to take as the basis of the tax the "reserves the

net additions to which are included in net income under the provisions" of the Income Tax Law, namely, items 8, 10 and 44 in the Company's Annual Report, he would have had a lawful basis for taxation; he would then have collected a tax which bore some reasonable relation to the fair value of the capital stock of such a corporation. These items for the taxable year ending June 30, 1919 (R. 112, 114) aggregate $4,646,415, putting the Company where it belongs,—between the Equitable and the Metropolitan on the basis of the valuation upon which their stockholders surrendered their stock.

V.

The judgment as to the company's First, Second and Third causes of action should be reversed and a new trial granted.

Respectfully submitted,

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Dated October 8, 1930.

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Nos. 93 and 160

In the Supreme Court of the United States

OCTOBER TERM, 1930

NEW YORK LIFE INSURANCE COMPANY, PETITIONER

v.

FRANK COLLIS BOWERS, EXECUTOR OF THE ESTATE OF FRANK K. BOWERS, DECEASED, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

FRANK COLLIS BOWERS, EXECUTOR OF THE ESTATE OF FRANK K. BOWERS, DECEASED, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK, PETITIONER

v.

NEW YORK LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FRANK COLLIS BOWERS, EXECUTOR

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 93

NEW YORK LIFE INSURANCE COMPANY, PETITIONER

v.

FRANK COLLIS BOWERS, EXECUTOR OF THE ESTATE OF Frank K. Bowers, Deceased, Formerly Collector of Internal Revenue for the Second District of the State of New York

No. 160

FRANK COLLIS BOWERS, EXECUTOR OF THE ESTATE OF Frank K. Bowers, Deceased, Formerly Collector of Internal Revenue for the Second District of the State of New York, petitioner

v.

NEW YORK LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FRANK COLLIS BOWERS, EXECUTOR

OPINIONS BELOW

The opinion of the District Court (R. 27-33) is reported in 34 F. (2d) 60. The opinion of the Cir-

cuit Court of Appeals (R. 184–191) is reported in 39 F. (2d) 556.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 10, 1930. (R. 192.) A petition for rehearing was filed by the Collector of Internal Revenue on March 20, 1930, and was denied on April 7, 1930. (R. 192.) Petitions for writs of certiorari were filed on April 26, 1930, in No. 93, and on May 26, 1930, in No. 160. (R. 194.) Writs of certiorari were granted on June 2, 1930. (R. 193.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the Revenue Act of 1921 should be construed to repeal the provisions of Section 1000 (c) of the Revenue Act of 1918 so as to relieve life insurance companies from the payment of any capital stock taxes for the two years beginning July 1, 1920, and ending June 30, 1922, or for either of these years.

(2) Whether the Commissioner of Internal Revenue, in computing the basis for the capital stock tax of a mutual life insurance company for each of the four years beginning July 1, 1918, and ending June 30, 1922, erred in refusing to exclude the amounts shown in items 35, 36, and 37 of the company's statement to the Superintend-

ent of Insurance of the State of New York as of the end of the preceding calendar year, these items representing (1) dividends declared shortly after the end of that calendar year for payment to policyholders during the year in which they were declared and (2) an "Interim Accumulation Fund," which consisted of amounts set aside over a period of several years from which the company expected to declare dividends to holders of deferred-dividend policies in subsequent years.

STATUTES AND REGULATIONS INVOLVED

The statutes involved and also various regulations and rulings of the Treasury Department are printed in the appendices, pp. 59–92, *infra*. The Government contends that all of the taxes in question were properly collected under the following provisions of Section 1000 (c) of the Revenue Act of 1918:

> * * * The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income-tax return: * * *

STATEMENT

The New York Life Insurance Company brought an action in the District Court against the Collector of Internal Revenue to recover capital stock taxes assessed against it and paid under the Revenue Act of 1918 for the four years beginning July 1, 1918, and ending June 30, 1922. (R. 1–18.) July trial was waived by written stipulation and the court adopted an agreed statement of facts as its findings. (R. 33–34.) The court concluded as a matter of law that the plaintiff was not entitled to recover anything on account of the amounts paid for the first three of these years, but held that the applicable statutes imposed no capital stock tax on life insurance companies for the year beginning July 1, 1921. It accordingly entered judgment for the plaintiff for the full amount claimed for that year, and dismissed the complaint as to the other years. (R. 35–36.) On appeals by both parties, the Circuit Court of Appeals affirmed the judgment. (R. 192.)

The company filed with the Collector of Internal Revenue, on forms prescribed by the Treasury Department for that purpose, returns for the years beginning on July 1, 1918, July 1, 1919, July 1, 1920, and July 1, 1921, for the special tax imposed by Section 1000, Title X, of the Revenue Act of 1918, ordinarily referred to as "Capital Stock Tax." These returns showed no such tax due from the company for any of these years. The Commis-

sioner of Internal Revenue assessed against the company capital stock taxes for each of these years for a substantial amount, varying from $124,500 for the year beginning July 1, 1918, to $94,134 for the year beginning July 1, 1921. The company paid the amounts assessed involuntarily and under protest, and duly filed claim for refund of all of these taxes, which claim was duly rejected. (R. 38–39.) The litigation involves two distinct questions—(1) for what years the applicable statutes imposed the tax on mutual life insurance companies, and (2) on what items the tax should be based. The answer to the first of these questions depends entirely upon the proper construction of certain statutory provisions and upon the effect of regulations and the practice of the Treasury Department. The second branch of the case involves another question of statutory construction and the application of the statute to certain items in the company's annual financial reports. To determine this matter, it is necessary to understand the nature of these items, and this requires consideration of the nature of the company's business and the procedure by which the items in question were determined by the company.

The Commissioner, in assessing capital stock taxes for each of the years in question, deducted from the book value of the taxpayer's "admitted assets" as of December 31 of the preceding year (1) the difference between the book value and the

market value of these "admitted assets"; (2) the amount of the legal reserves; (3) numerous other items known as "debt liabilities"; and (4) the statutory exemption of $5,000. The controversy is as to the propriety of the Commissioner's refusal to deduct from the book value of the company's "admitted assets" appearing in its statement to the Insurance Superintendent as of December 31 of the preceding year three items appearing in that statement under the schedule headed "V.—Liabilities, Surplus, and Other Funds," designated as follows:

> Item 35: Dividends declared on or apportioned to annual dividend policies payable to policyholders to and including December 31 [of the year following that for which the report was made], whether contingent upon payment of renewal premiums or otherwise.
>
> Item 36: Dividends declared on or apportioned to deferred dividend policies payable to policies to and including December 31 [of the year following that for which the report was made].
>
> Item 37: Amount set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in Item 36.

In each year the aggregate of these three items more than exceeded the sum upon which the Commissioner assessed a capital stock tax, and if these items should have been excluded the company was

liable for no capital-stock tax for any of the years in question. The amount of Item 35 varied from $12,437,514, shown on the annual report as of December 31, 1917, to $16,431,339, shown on the annual report as of December 31, 1920; the amount of Item 36 varied from $14,123,549.64, shown on the report of December 31, 1917, to $21,015,315.87, shown on the report of December 31, 1920; and the amount of Item 37 varied from $107,041,778, shown on the report of December 31, 1917, to $76,176,646 shown on the report of December 31, 1920. (R. 46–58.)

The agreed statement of facts (which the District Court adopted as its findings) (R. 37–173) contains a detailed explanation of the company's manner of carrying on business, as well as a recital of other vital facts, and includes as exhibits copies of certain resolutions of the company's Board of Directors and copies of the annual statements filed by the company in the office of the Superintendent of Insurance of the State of New York for the calendar years ending December 31, 1916, December 31, 1917, December 31, 1918, December 31, 1919, and December 31, 1920. The following is an epitome of the most essential facts found.

The company is a corporation incorporated by special charter under the laws of New York and transacted the business of life insurance on a purely mutual, level premium plan. It never has had any capital stock or stockholders, and its business is

managed by a Board of Directors elected by the policyholders and officers appointed by that Board. (R. 37.) It is the essence of mutual life insurance upon this plan that each policyholder is entitled to receive his insurance at cost. The company collects level premiums in advance. The premium consists of the sum which it is calculated that each insured must pay so as to put the company in funds with which to pay all outstanding policies as they become due, plus a sum, technically called "loading", to take care of expenses, unforeseen contingencies, and the like. (R. 39–40.)

The company issued contracts on two general plans, one known as the "annual-dividend plan" and the other as the "deferred-dividend plan." The annual-dividend plan provides for accounting to the insured each year on the anniversary of his policy for annually ascertained divisible surplus for the prior year or years. In its deferred-dividend policies, the company agreed at a designated period after the time when the insurance took effect to account to the policyholders for the amount of the annually ascertained divisible surplus plus accumulated interest and plus a proportionate share of the accumulated overpayments of all policyholders of the class whose several policies were not in force at the time named therein for paying a dividend. A deferred dividend policyholder lost or forfeited all share in this fund by the lapse of his policy or by his death before the divi-

dend date named therein, in which event the amount to which he would have become entitled remained in the fund to be distributed among the surviving members whose policies were in force on maturity of the same in the year in which the dividend became payable. (R. 42–45.)

The company's charter and the laws of New York provided that as soon as practicable after December 31 of each year it should cause a statement to be made of its affairs, ascertain the surplus earned by it during the year, and determine the amount of surplus for the current and prior years which might, in the judgment of the Board of Directors, safely be distributed. In January or February of each year the company took such action. The first step in this determination was to ascertain the total receipts for the year in question, which was the sum of all premiums received during the year plus receipts from other sources. The company then ascertained the amount of policy claims paid for such year, the amount of its current expenses for such year, and the several sums required to increase its reserves. The total of these amounts was subtracted from the total receipts, and the difference was designated as the "Surplus" for the year. The Board of Directors at its meeting transferred to an account called "Undivided Surplus Account" not only this surplus for the year but also a certain amount from the item designated "Latent Fund for Contingencies and Dividends." (Neither the "Undivided

Surplus" nor the "Latent Fund" appear in the annual statements to the Insurance Superintendent.) At the same meeting the board appropriated from the "Undivided Surplus Account" a certain amount as dividends to those policies participating annually in surplus on their anniversaries in the current year, i. e., the year in which the appropriation was made. The sum so appropriated each year was shown as Item 35 in the annual statement as of the end of the preceding year. (R. 40–41, 47, 62.)

Part of this "Undivided Surplus Account" was each year credited to the "Interim Accumulation Fund." This last named fund was held by the company awaiting apportionment among its deferred dividend policyholders on the several dates named in their respective policies for paying such dividend. Thus each year this fund, which had been accumulating for many years, was added to, and each year a certain amount was appropriated from it for the payment of dividends to the deferred dividend policyholders whose policies were to mature in the current year. The amount so appropriated shortly after the end of the calendar year constituted "Item 36" in the annual statement as of the end of the calendar year which ended just before the appropriation. (R. 42, 48.)

The balance in this "Interim Accumulation Fund" was held by the company awaiting apportionment among the deferred-dividend policyhold-

ers in subsequent years. The amount held in the "Interim Accumulation Fund," as affected by adjustments due to the addition to and subtractions from it shortly after the end of the year, appeared in the annual statement as "Item 37." (R. 42, 49.)

The "Undivided Surplus Account" evidently existed only for purposes of the meeting of the Board of Directors, as the entire amount of it was credited at that meeting to some other account. The balance which remained in it after the appropriations above described was transferred to the "Security Fluctuation and General Contingency Fund," except in one year. At the meeting of February 13, 1919, a transfer was made from the "Security Fluctuation Fund" to the "Undivided Surplus Fund," instead of from the "Undivided Surplus Fund" to the "Security Fluctuation Fund." (R. 61–74.)

The company's assets are in no wise segregated or in any way ear-marked for investment purposes, and the company did not separately invest any sums shown in Items 35, 36, and 37. When, as in Item 37, a specified sum was held to the credit of a group or where a sum was held to the credit of a single individual, the company each year at the annual accounting increased the sum so held, with interest at the average rate earned during the preceding year on all of its invested funds. (R. 60.)

The company made its income tax returns on the cash basis for each calendar year. (R. 59–60.)

In the annual statements to the Insurance Superintendent the company's "admitted assets" (which the Commissioner used as a starting point in computing the assessment of the tax) included certain sums which had accrued but had not been received, and the items which were subtracted as liabilities included certain liabilities which had accrued but had not been paid. (Cf. R. 46 with R. 107–114.)

SPECIFICATION OF ERRORS TO BE URGED

On the phase of the case as to which the taxpayer prevailed in the court below, we contend that the Circuit Court of Appeals erred:

1. In holding that the income tax imposed upon life insurance companies by Section 243 of the Revenue Act of 1921 was in lieu of the capital stock tax imposed upon such companies by Section 1000 (c) of the Revenue Act of 1918 for the period beginning July 1, 1921, and ending June 30, 1922.

2. In holding that respondent was entitled to recover the capital stock tax paid for the period beginning July 1, 1921, and ending June 30, 1922.

SUMMARY OF ARGUMENT

I

The taxpayer is liable for capital stock taxes for four years beginning July 1, 1918, and ending June 30, 1922. It contends that the applicable Revenue Acts imposed no capital stock tax on life insurance companies for the two years be-

ginning July 1, 1920, and July 1, 1921, respectively. Each of the courts below held that a tax was imposed for the first of these periods, but was not imposed for the last of them. We maintain that it was imposed for both of these periods.

The decision of the District Court was based upon its assumption that the tax collected under the fourth assessment, i. e., for the year July 1, 1921, through June 30, 1922, "would have become due only on July 1, 1922." We submit that this was error, and that under the Revenue Act of 1918 the capital stock taxes were payable on or shortly after July 1 of each of the years 1918, 1919, 1920, and 1921, in advance for the period of a year beginning on July 1. The first capital stock taxes were imposed by Section 407 of the Revenue Act of 1916, and the practice of the Treasury Department under this was to require returns to be filed each July and to require the tax to be paid then for the ensuing fiscal year. The Revenue Act of 1918, which was approved February 24, 1919, repealed the capital stock tax provisions of the Revenue Act of 1916. Section 1000 of the 1918 Act imposed the tax involved in the instant case "on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916." The regulations and practice under the new Act treated the tax as payable in advance for the period of a year beginning July 1. The forms of the Treasury Department so provided and the taxpayer made

its returns on these forms. There is clear indication in *Hecht* v. *Malley*, 265 U. S. 144, 163–164, that the tax was payable in advance.

Consequently, on July 1, 1921, before the passage of the 1921 Act, the taxpayer came under an absolute liability to pay the capital stock tax for the privilege of carrying on its business for the ensuing year. The Circuit Court of Appeals recognized this, but held that the 1921 Act operated to relieve the taxpayer of liability for this tax. But we submit that there is no intimation in the 1921 Act, passed November 23, 1921, that Congress intended to remit the capital stock taxes which had already become due and payable. Section 1400 (a) of the 1921 Act provided for the repeals of various parts of the Revenue Act of 1918 to take effect at certain different designated dates. The repeal of Title X, which included the capital stock tax, was to take effect on January 1, 1922, and the repeal of certain other parts of the Act of 1918, including the income tax provisions and the profits tax provisions, was as of January 1, 1921. The postponement of the repeal of the capital stock tax until January 1, 1922, is so specific that it can not be disregarded, particularly in the light of Section 1400 (b), which provides:

> The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued

under the Revenue Act of 1918 at the time such part ceased to be in effect.

We maintain that the other provisions of the Act of 1921 on which the taxpayer and the Circuit Court of Appeals relied were not intended to nullify these express provisions.

The construction for which we contend effects an orderly program and does not compel a life insurance company to pay in any one year more taxes than Congress intended it to pay annually. The construction adopted by the Circuit Court of Appeals would allow life insurance companies in 1921 to escape part of the taxes to which they were subject in prior years without paying any part of the taxes to which they were subject in later years.

II

The Commissioner acted correctly in refusing to deduct from the assets on which the capital stock tax was based in each year the amounts shown in Items 35, 36, and 37 of the annual statement to the Insurance Superintendent as of December 31 of the preceding year.

Section 1000 (c) of the Revenue Act of 1918 imposed on every domestic mutual insurance company a tax based upon "the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding

accounting period used by such company for purposes of making its income tax return." The company made its income tax return on the basis of the calendar year. The return for capital stock tax purposes was prepared each year in July (or later) for a year beginning July 1.

We maintain that all of the three items in question were "surplus" within the meaning of the statute. Whether the words in the statute "maintained for the general use of the business" modify the word "surplus" is unimportant, as surplus is, of course, maintained for the general use of the business, inasmuch as it is employed in financial operations and is available to meet obligations. The word "surplus" must include so much of the assets of a mutual life insurance company as remain after deducting the amount of all existing matured claims and the legal reserve for payment of insurance which will mature in the future.

In a mutual company, the policyholders are associates in the business as to which they are investors, as well as creditors of the group as a whole. They are, therefore, the collective owners of all profits which the company makes, and these profits are distributed among them in the form of dividends. The profits arise to a great extent from investment of funds and, to a smaller extent, from redundancy in premiums paid by the policyholders. Their rights to dividends and to control over the assets of the corporation are similar to the rights

of stockholders in a stock corporation. While each policy provides for the declaration of the profits in the form of dividends, it is as a charter—also a contract—provides for the declaration of dividends to shareholders in a stock company.

The items in question were nothing but bookkeeping items and existed as separate funds only on the books of the company. The company's assets were in no way segregated or in any way earmarked for investment purposes, and the company did not separately invest any sums shown in the items in question. At the end of the year for which the statement to the Insurance Superintendent was made, no person had any right to any particular amount on account of any of the three items. Although the company's charter, the policies, and the New York insurance law all required the directors to make appropriations for dividends shortly after the end of each year if circumstances warranted so doing, the amount of dividends to be declared was left largely to the discretion of the directors, and we are aware of no case in which it has been held that the directors could be forced to declare a dividend different from what they actually did declare. None of these items constituted trust funds, and it has been held by the highest court of New York that even upon the maturity of his policy a policyholder has no right to require an accounting of the funds of the company in the absence of a proof of wrongdoing or mistake.

The creation of the "Interim Accumulation Fund," Item 37, had no legal effect. It was maintained merely to show the result of the calculations and determinations of the directors and officers of the company over a period of years. If unforeseen events should occur, the amount represented by this item could, if necessary, have been devoted to the payment of life insurance on policies which matured unexpectedly, as well as of other valid claims against the company. The same is true, we submit, of Items 35 and 36, i. e., the amount of the dividends, at the end of the year before the dividends were declared. Not until the dividends were declared could any policyholder maintain an action to recover the dividend if the company had refused to pay it.

Consequently, the amounts represented in Items 35 and 36 up to the time of the declaration of the dividend and the amounts represented in Item 37 at all times were subject to no different obligations than they would have been subject had they been carried in a single account entitled simply "Surplus." The amount added each year to the "Interim Accumulation Fund," as well as the amount declared as a dividend payable to holders of annual dividend policies, passed through an account known as "Undivided Surplus Account." This account was composed partly of the profits for the year, which are designated in the company's charter, in the resolutions of the directors, in the poli-

cies, and also in the agreed statement of facts as "Surplus" or "Divisible Surplus." The rest of the "Undivided Surplus Account" was composed of appropriations made from the "Latent Fund for Contingencies and Dividends" and from the "Security Fluctuation and General Contingency Fund." This Court has designated the funds which went into the items now under consideration as "surplus." *New York Lift Ins. Co.* v. *Edwards*, 271 U. S. 109, 115. All of these funds alike were subject to distribution to policyholders proportionately to such extent as the directors felt it safe to diminish these funds.

The tax should be measured by business and financial realities and not by bookkeeping forms or mere names. *Hecht* v. *Malley*, 265 U. S. 144, 163. The Treasury Department has always construed Section 1000 as requiring the inclusion of the three items in question, and it has also allowed the taxpayer the benefit of including the items in question as surplus in computing invested capital for purposes of the profits tax.

If the items in question do not come within the description of "surplus or contingent reserves maintained for general use of the business," Item 37, at least, comes within the description "any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return." The word "reserves" in this

statute can not be restricted to its technical meaning because there are no reserves in the strict sense which come within this description. Item 37, known as the "Interim Accumulation Fund," was designated in the resolutions adopted by the directors as a "reserve." The additions to it were included in net income under the provisions of Title II, relating to the income tax.

The items in question are not excluded by Section 1000 (b). The placement of the provisions of Section 1000 (c), relating to mutual insurance companies, shows that (b) is not intended to limit (c), and the legislative history of the Act shows that (b) relates only to stock companies.

ARGUMENT

I

THE TAXPAYER IS LIABLE FOR CAPITAL STOCK TAXES FOR FOUR YEARS BEGINNING JULY 1, 1918, AND ENDING JUNE 30, 1922

The taxpayer contends that in any event the applicable Revenue Acts imposed no capital stock tax on life insurance companies for the two years beginning July 1, 1920, and July 1, 1921, respectively. Each of the courts below held that a tax was imposed for the first of these periods, but was not imposed for the last of them. We maintain that it was imposed for both of these periods, as well as for the two years beginning July 1, 1918, and July 1, 1919.

The decision of the District Court was based upon its assumption that the tax collected under the fourth assessment, i. e., for the year July 1, 1921, through June 30, 1922, "would have become due only on July 1, 1922." (R. 32.)

The Circuit Court of Appeals, although realizing that the tax was payable in advance, nevertheless held that the statute was repealed so as not to be in effect for this fourth year. (R. 190.)

We submit that both courts erred.

(A) Under the Revenue Act of 1918, the capital stock taxes were payable on or shortly after July 1 of each of the years 1918, 1919, 1920, and 1921, in advance for the period of a year beginning on July 1.

The first capital stock taxes were imposed by Section 407 of the Revenue Act of 1916,[1] which was approved September 8, 1916. It imposed these taxes "on and after January 1, 1917." These were designated as "special taxes" in the Revenue Act of 1916. Inasmuch as the Act of October 1, 1890,[2] provided that "all special taxes shall become due on the first day of July," and it had been the practice to require payment in advance, and Sec. 409 of the 1916 Act made such administrative provisions a part of the 1916 Act, the Treasury Department, in Article 3 of Regulations 38,[3] promulgated October 19, 1916, under the Revenue Act of 1916, stipulated that—

> the capital stock tax, therefore, which becomes effective January 1, 1917, will be payable in January, 1917, on returns to be made during that month for the six months ending June 30, 1917. In July, 1917, and annually in July thereafter returns must again be made and the tax paid for the ensuing fiscal year.

This principle was followed in the form of return prepared by the Treasury Department. Thus,

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[1] This is printed on p. 59, *infra*.

[2] See p. 66, *infra*.

[3] This is printed in full on pp. 75–76, *infra*.

the form to be made out in July, 1918, contained the following words on the heading: [4]

> Return of Fair Value of Capital Stock for the Fiscal Year ended June 30, 1918.
> Tax Payable in Advance for the Year ending June 30, 1919.

And the instructions printed on this form included the following: [5]

> 1. *Nature of tax.*—The capital stock tax due July 1, 1918, is an excise tax payable in advance for the privilege of doing business from July 1, 1918, to June 30, 1919. The amount of the tax is payable to the collector at any time after July 1, 1918, but penalties for nonpayment do not attach until 10 days after notice and demand has been served by the collector upon the taxpayer.
>
> 2. *Date of filing returns.*—On or before July 31, 1918, and annually thereafter during the month of July.

The Revenue Act of 1918, which was approved February 24, 1919, repealed Title IV of the Revenue Act of 1916 (of which Section 407 was a part). See § 1400(a). Section 1000 (under Title X—"Special Taxes") of the Revenue Act of 1918 imposed the tax involved in the instant case "on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the

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[4] For facsimile of this Form 707, see Regulations 38 (Revised), in Volume 20, Treasury Decisions, Internal Revenue, at page 470.

[5] 20 Treasury Decisions, Internal Revenue, p. 476.

Revenue Act of 1916." Section 1305 extended generally the existing administrative provisions of law, and under date of April 29, 1919, the Treasury Department promulgated "Regulations 50, relating to the capital stock tax under the Revenue Act of 1918," Article 1 of which provided:

> The tax became effective as of July 1, 1918, and is to be paid annually in advance for each year beginning July 1, in lieu of the capital-stock tax imposed by the Revenue Act of 1916. The tax for the first year ending June 30, 1919, although necessarily not payable in advance, must be paid upon notice and demand by the collector. * * *

Form 707, which had been used under the 1916 Act, was revised from time to time while the 1918 Act was in effect, but it always clearly indicated that the tax was payable in advance.*

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* Thus the form, as revised February, 1921, for use in that year was headed:

1922 RETURN

CAPITAL STOCK TAX

Return for Domestic Corporations

(Sec. 1000, Title X, Revenue Act of 1918)

File with Collector of Internal Revenue for your district on or before July 31, 1921, to avoid penalty

* * * * * *

TAX PAYABLE ANNUALLY IN ADVANCE

Return for taxable period July 1, 1921, to June 30, 1922, based on fair average value of capital stock for preceding year

CAREFULLY READ ALL INSTRUCTIONS BEFORE MAKING RETURN

The instructions on the return included the following:

1. *Nature of tax.*—The capital stock tax due July 1, 1921, is an excise tax payable in advance for the privilege of doing business from July 1, 1921, to June 30, 1922.

2. *Date of filing returns.*—During the month of July and annually thereafter.

It is, therefore, clear that at all times the Treasury Department treated capital stock taxes as payable in advance for the period of a year beginning July 1.[7] As this practice had been in effect under the Revenue Act of 1916, Congress, by the Act of 1918, obviously intended to continue this practice, and the language of Section 1,000 itself indicates that it intended to impose the new tax for the year beginning July 1, 1918.[8]

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[7] Article 2 of Regulations 64 (*infra*, p. 79), promulgated under the 1921 Act, made the same provision in regard to the capital stock tax under that Act. The same provision was also made by Article 2 of Regulations 64 (1924 ed.), promulgated under the 1924 Act.

[8] Section 1000 of the Revenue Act of 1921 (pp. 63–64, *infra*) and Section 700 of the Revenue Act of 1924 imposed capital stock taxes, in lieu of those previously imposed, "on and after July 1, 1922," and "on and after July 1, 1924," respectively. With the administrative procedure before it, Congress not only did not interfere with it, but reenacted capital stock tax provisions in such a way as to manifest approval of the administrative procedure. See *National Lead Co.* v. *United States*, 252 U. S. 140, 145–146; *Brewster* v. *Gage*, 280 U. S. 327, 336. Additional evidence that Congress intended the special taxes to be paid in advance is found in the fact that each of the Revenue Acts provided that any person "who carries on any business or occupation for which a special tax is imposed * * * without having paid the special tax therein provided, shall, besides being liable to

In *Hecht* v. *Malley,* 265 U. S. 144, 163–164, this Court said, in regard to the capital stock tax, that the Act of 1918 "was retroactive in its provisions and covered the year ending June 30, 1919." It seems that it would not have been necessary for the Court to have considered this matter if the tax were not due and payable at the beginning of the year in July, 1918. Otherwise, the tax would have been imposed for the year in question even if the Act had not been retroactive.

We conclude that, before the Revenue Act of 1921 was approved on November 23, 1921, returns had been required[9] for capital stock taxes and capital stock taxes had become due and payable under the 1918 Act for four different years, i. e., the years beginning July 1 of 1918, 1919, 1920, and 1921.

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the payment of such special tax" be subject to a certain penalty or to imprisonment. See Section 408 of the Revenue Act of 1916, Section 1005 of the Revenue Act of 1918, Section 1004 of the Revenue Act of 1921, Section 704 of the Revenue Act of 1924. The capital stock taxes were repealed by Section 1200 of the Revenue Act of 1926 as of June 30, 1926, and there have since been no such taxes in effect.

[9] Although the record does not contain copies of the returns made by the taxpayer under the capital stock provisions of the Act of 1918 and the findings do not state on what date such returns were made, it appears both from the findings and from the complaint that the taxpayer filed a return on the form furnished by the Treasury Department for each of the four years beginning July 1, 1918, and ending June 30, 1922. (R. 2, 38.) Its complaint asserted four causes of action, each being for the tax paid for one year, the first being headed, "For the recovery of the capital stock tax paid for the period ending June 30th, 1919," and the fourth (as to which the courts below allowed recovery) being "for the period ending June 30th, 1922." (R. 15.)

Therefore, the basis falls for that part of the decision of the District Court which is adverse to us.[10]

(B) The Revenue Act of 1921 did not remit the capital stock tax which had become due in July, 1921

It is clear that on July 1, 1921, before the passage of the 1921 Act, the taxpayer came under an abso-

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[10] The Circuit Court of Appeals answered the reasoning of the District Court on this point in the following effective manner (R. 191):

"* * * It is true, as the district court observed, that § 1000 (c) of 1916 provides that 'the taxes imposed * * * shall not apply in any year to any corporation which was not engaged in business * * * during the preceding year'; and § 1000 (a) (1) computes them on 'the fair average value' of the capital for the preceding year. Of course it is impossible to calculate such a tax in the case of a company that had done no business during any part whatever of the preceding year. But § 1000 (c) does not say that the company must have been in business 'during the whole of the preceding year,' but only 'during the preceding year.' The same applies to the use as a basis of the 'fair average value—for the preceding year.' It was entirely possible to compute the tax in the case of a company which had been in business for a part of the preceding year, and this satisfies all that the words demand. The Court of Claims (*Washington Water Power Co.* v. *U. S.*, 56 Ct. Claims 76), has decided in a case arising under the Act of 1916, that the tax is payable in advance, and this seems to us the proper construction. Finally, as we have said, the tax had its origin in the Revenue Act of 1916, which imposed it for the year beginning January 1, 1917. While it is possible that Congress meant to levy it for a period during which the act was not in effect, the language is 'on and after January 1, 1917.' It is more likely that such an excise in accordance with the usual theory, was laid prospectively upon an activity to be engaged in, than upon its pursuit during a time when there was no tax in view."

lute liability to pay a tax for the privilege of carrying on its business for the ensuing year. There is no intimation in the 1921 Act, passed November 23, 1921, that Congress intended to remit the tax which had already become due and payable.

Section 1400 (a) of the Act of 1921 [11] provided for repeals of various parts of the Revenue Act of 1918, to take effect at certain different designated dates. The repeal of Title X, which included the capital stock tax, was to take effect on January 1, 1922, and the repeal of certain other parts of the Act of 1918, including the income tax provisions and the profits tax provisions, was as of January 1, 1921. The postponement of the repeal of the capital stock tax until January 1, 1922, is so specific that it can not be disregarded, particularly in the light of Section 1400 (b), which provides:

> The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect * * *.

The construction contended for by the taxpayer and that adopted by the Circuit Court of Appeals would give no effect whatever to these provisions as applied to this tax.

We submit that the other provisions of the Act of 1921 on which the taxpayer and the Circuit

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[11] Printed on pp. 64–65, *infra*.

Court of Appeals relied were not intended to nullify the express provision of Section 1400 quoted above. That court based its conclusion chiefly upon another sentence in Section 1400 (b) which reads as follows:

> In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

This sentence, we submit, does not operate to accelerate the repeal provided for in Section 1400 (a), as held by the Circuit Court of Appeals, but merely to extend the provisions of the Revenue Act of 1918 beyond the time of its repeal under certain circumstances. Moreover, the "corresponding tax" under the 1921 Act did not take effect until July 1, 1922, for Section 1000 (a) of the Revenue Act of 1921 provided that—

> * * * on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

certain excise taxes should be imposed.

It was the evident intent of Congress to continue the capital stock tax imposed by the Revenue Act of 1918 without interruption until the capital stock tax imposed by the Revenue Act of 1921 became effective on July 1, 1922. But the capital stock tax imposed by the 1921 Act was not applicable to life

insurance companies. In lieu thereof such companies were subjected to a special income tax by Section 243. This was in lieu of the new capital stock tax and there is no evidence of an intent that the 1918 capital stock tax was to end any earlier in the case of life insurance companies than in the case of other companies. On the contrary, the legislative history indicates that Congress intended life insurance companies to remain subject to the 1918 capital stock tax until all companies were relieved from it by the incidence of the new tax.

The report of the Senate Finance Committee (Senate Report No. 275, 67th Congress, 1st Session) accompanying the Revenue Bill of 1921, contains the following (p. 20):

> Sections 242–246 provide a new plan for the taxation of life insurance companies, substantially similar to the plan embodied in the revenue act of 1918 as first adopted by the Senate. * * * The new tax would take the place of the present income and excess-profits taxes for the year 1921, *and life insurance companies would share with other insurance companies in the repeal in the year 1922 of the capital-stock tax* and the taxes imposed by section 503. The new tax will yield a larger revenue than the taxes which it is proposed to replace. (Italics supplied.)

In the same Report (p. 30), the Senate Finance Committee said:

Section 1000 provides for the repeal of the capital-stock tax imposed by section 1000 of the revenue act of 1918 after June 30, 1922.

The brief for the taxpayer stresses the fact that Section 263 of the 1921 Act provides that the income tax provisions (including Section 243, which imposes the income tax on life insurance companies in lieu of the other taxes imposed by the Revenue Act of 1921) "shall take effect as of January 1, 1921." But this provision operated merely to require that the taxes on account of 1921 income should be computed in accordance with the new provisions. The Act of 1921 did not impose any new tax which was payable in 1921,[12] but provided that during that year the taxes which had accrued under the 1918 Act should be paid. See Sections 200, 230, 241, 227, and 250 of the Act of 1921, as well as the provisions of Section 1400 (b), quoted on p. 28, *supra*.

The taxpayer's brief also argues that the capital stock tax due in 1921, imposed by the 1918 Act, was repealed by implication by the Act of 1921. This argument is based upon the contention that

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[12] Except as to corporations making their returns upon the basis of a fiscal year other than the calendar year. Such corporations were taxed under the 1918 Act on so much of the income for the fiscal year as was attributable to 1920 and under the 1921 Act on so much of the income as was attributable to 1921. See Section 205 of the 1921 Act, and p. 36, *infra*.

the Act of 1921 "covers the whole field embraced by the Act of 1918." But the question is how the two Acts dovetail together, and at what time the provisions of the Act of 1921 replace those of the Act of 1918. In view of the explicit statements in the Act of 1921 that the repeal of the capital stock tax is as of January 1, 1922, that the new capital stock tax is not to take effect until July 1, 1922, and that taxes which have accrued prior to the passage of the Act of 1921 shall not be affected, there is no room for any implication. Under the provisions of Section 13 of the Revised Statutes (p. 66, *infra*), "liabilities incurred" under a repealed statute are preserved unless the repealing Act expressly or by necessary implication excludes the operation of that section, the provisions of which are to be treated as if incorporated in and as a part of subsequent enactments. *Hertz* v. *Woodman*, 218 U. S. 205, 217–218; *Page* v. *Skinner*, 293 Fed. 468, 470 (D. Colo.), affirmed, 298 Fed. 731 (C. C. A. 8th), certiorari denied, 266 U. S. 625.

In holding that Congress did not intend that life insurance companies should be subject to the 1918 capital stock tax at a time when the new income tax imposed by Section 243 of the 1921 Act was in effect, the Circuit Court of Appeals has overlooked the fact that life insurance companies were specifically subjected by the 1918 Act to four different taxes at the same time. Section 230 of that Act imposed an income tax, Section 301 imposed an excess profits

tax, Section 503 imposed a tax on the issuance of insurance policies, and Section 1000 imposed a capital stock tax.

By its terms, Section 243 of the 1921 Act imposed taxes in lieu of Section 1000 of the same Act and also in lieu of taxes imposed by Section 230 and by Title III of that Act; but it did not impose any tax in lieu of the taxes here in question imposed by Section 1000 of the 1918 Act. One must therefore look to the corresponding Section 1000 of the 1921 Act to find provision for the imposition of any tax which takes the place of the taxes previously imposed by Section 1000 of the 1918 Act. But Section 1000 of the 1921 Act is by its terms effective for this purpose only on and after July 1, 1922. Thus Section 243 imposed no taxes in lieu of those capital stock taxes which became due and payable prior to July 1, 1922. As by its terms that section imposed no tax in lieu of the tax here in question, Section 1400 (b) of the 1921 Act continued the provisions of Section 1000 of the 1918 Act in force until July 1, 1922, when the corresponding tax under the 1921 Act (i. e., the tax imposed by Section 1000 of that Act) took effect.

It is only when we are asked if an insurance company is required to pay a capital stock tax under the Revenue Act of 1921 (that is, for the year beginning July 1, 1922—a year following the last year taxed in this case) that we consider whether Section 1000 (b) exempting certain insurance cor-

porations from this tax applies. Whether it is then to be exempted depends upon a consideration of the income tax provisions of the 1921 Act and not of any earlier Act. If under the 1921 Act an insurance company paid certain income tax in lieu of all other taxes, then it is exempt from the payment of a capital stock tax under the 1921 Act. This, of course, can have no reference to its tax liability under the 1918 Act. The Government is not seeking to impose or to uphold a tax for the year beginning July 1, 1922.

The construction for which we contend effects an orderly program and does not compel the taxpayer to pay in any one year more taxes than Congress intended it to pay annually. Under our construction a life insurance company like the taxpayer here would pay the following taxes in the year 1921: (1) the income tax imposed by the 1918 Act on income for the calendar year 1920; (2) profits tax [18] imposed by the Act of 1918 on income for the year 1920; (3) the capital stock tax imposed by the Act of 1918, payable July 1, 1921, for the year beginning on that date; and (4) the tax on issuance of policies. Thus, during 1921 the taxpayer would pay only those taxes provided under

[18] In view of the holding in *Duffy* v. *Mutual Benefit Co.*, 272 U. S. 613, probably many mutual companies actually paid no profits tax.

the Act of 1918. In the year 1922 it would pay only the tax imposed by the Act of 1921 on income for the year 1921. There consequently is no duplication or overlapping, and it is apparent that the provisions for repeal in the Act of 1921 were not drawn carelessly or inadvertently but that they were designed and were well calculated to dovetail the two Acts.

On the other hand, the construction adopted by the Circuit Court of Appeals would produce the following result: During the year 1921 the taxpayer would pay only (1) income tax on income for the year 1920 under the Act of 1918, and (2) profits tax for the year 1920 under the Act of 1918; and it would pay no capital stock tax whatever and it would pay nothing on account of the larger income tax imposed by the Act of 1921, which was first payable in the year 1922. And in the year 1922 it would pay only that tax. The result of the decision of the Circuit Court of Appeals consequently is to allow the taxpayer in 1921 to escape part of the taxes to which it was subject in prior years without paying any of the taxes to which it was subject in later years.

Congress was obviously concerned with the amount of revenue which would be collected in each calendar year and with the amount which the taxpayer would actually pay in any calendar year, rather than the amount of taxes which might accrue in the case of any taxpayer during the calendar

year. It is noteworthy that the books of this taxpayer were kept and its income-tax returns were made on the cash basis. (R. 60.)

There is no occasion to be concerned, as counsel for the taxpayer here appears to be (Br. pp. 26–27), for a corporation making a return on the basis of a fiscal year ending June 30, 1921. Under the provisions of Section 205 of the Revenue Act of 1921, such a corporation would in 1921 pay an income tax and profits tax for the last six months of 1920 on the basis of the provisions of the Act of 1918 and it would pay an income tax for the last six months of that period, i. e., the first six months of 1921, on the basis of the provisions of Section 243 of the Revenue Act of 1921. It would also pay the capital-stock tax imposed by the Act of 1918. It is true that its payments for 1921, the year of transition from the old taxes to the new, would be somewhat greater than would its payments in other years, but that is merely because its plan of adopting such a fiscal year in effect resulted in its paying some of the tax on the income for the year 1921 in that year instead of paying it all in the year 1922, as would a corporation which paid its tax on the basis of a calendar year.

II

THE COMMISSIONER PROPERLY INCLUDED IN THE MEASURE OF THE CAPITAL STOCK TAX FOR EACH YEAR THE THREE ITEMS APPEARING IN THE COMPANY'S STATEMENT FOR THE PRECEDING CALENDAR YEAR, REPRESENTING THE DIVIDENDS DECLARED AFTER THE END OF THAT CALENDAR YEAR AND THE "INTERIM ACCUMULATION FUND"

Under this point two questions arise: (1) Whether the items in question are included by the provision of paragraph (c) of Section 1000 of the Revenue Act of 1918, and (2) whether they are excluded by paragraph (b) of this section.

(A) The items in question are included by the provisions of paragraph (c) of Section 1000 of the Revenue Act of 1918

Paragraph (c) of Section 1000 provided that—

> The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income-tax return; * * *.

It thus becomes necessary to determine in the present case whether the items in dispute may properly be classified either as "surplus or contingent reserves maintained for the general use of the business" or as "reserves the net additions to which are included in net income under the provisions of Title II."

(1) The items in question are "surplus" within the meaning of this section

Both courts below held that these items were "surplus" within the meaning of Section 1000(c)—correctly, we maintain. Whether the words in the statute "maintained for the general use of the business" modify the word "surplus" is unimportant, as surplus is, of course, maintained for the general use of the business inasmuch as it is employed in financial operations and is available to meet obligations.

We submit that the word "surplus," as used in this section, must include so much of the assets of a mutual life insurance company as remain after deducting the amount of all existing matured claims and a proper reserve for payment of insurance which will mature in the future.

In order to determine the characteristics of the items in question, it is necessary to consider the nature of mutual life insurance which is conducted on the level premium plan (as was all of the insurance issued by this company) and also the rights of the policyholders in relation to the funds of the com-

pany. The essential facts upon which these matters are based are recited in the findings (see pp. 8–11, *supra*). This Court has summarized exactly the nature and incidents of this kind of insurance in *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523, 534, where it said:

> * * * the service performed in level-premium life insurance is both protection and investment. Premiums paid—not in the tax year, but perhaps a generation earlier—have earned so much for the co-operators, that the company is able to pay to each not only the agreed amount but also additional sums called dividends; and have earned these additional sums, in part at least, by transactions not among the members, but with others; as by lending the money of the cooperators to third persons who pay a larger rate of interest than it was assumed would be received on investments. The fact that the investment resulting in accumulation or dividend is made by a cooperative as distinguished from a capitalistic concern does not prevent the amount thereof being properly deemed a profit on the investment. * * *

In *Duffy* v. *Mutual Benefit Life Insurance Co.*, 272 U. S. 613, the Court, in holding that the legal reserves of a mutual life insurance company should be included in the computation of invested capital for purposes of the profits tax, said of legal reserves:

These assets, thus constituted, have never represented indebtedness any more than the capital of a stock corporation subscribed by its stockholders represents indebtedness. Until the maturity of a policy, the policyholder is simply a member of the corporation, with no present enforceable right against the assets. Upon the maturity of the policy he becomes a creditor with an enforceable right. Then for the first time there is an indebtedness. * * * In the meantime each member bears a relation to the mutual company analogous to that which a stockholder bears to the joint-stock company in which he holds stock. In either case, the title to the assets is in the corporation and not in the members or stockholders.

True, the amount of the reserve is carried on the books as a liability, but only as the capital stock of a stock corporation is carried on its books as a liability. In both instances, it is a form of bookkeeping to balance assets, which in the one case is contributed by the members and in the other by the stockholders. * * *

These statements are *a fortiori* true of the items in question, although they are not included in the legal reserves.

The following conclusions apply to all three of these items. They were nothing but bookkeeping items and existed as separate funds only on the

books of the company, as the company's assets were in no way segregated or in any way earmarked for investment purposes, and the company did not separately invest any sums shown in the items in question. At the end of any year no person had a right to any particular amount on account of any of the three items. Although the company's charter, the policies, and the New York insurance law all required the directors to make appropriations for dividends shortly after the end of each year if circumstances warranted so doing, the matter was left largely to the discretion of the directors, and we are aware of no case in which it has been held that the directors could be forced to declare a dividend different from what they actually did declare. None of these items constituted a trust fund, and even upon the maturity of a policy a policyholder has no right to require an accounting of the funds of the company in the absence of proof of wrongdoing or mistake. See *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 46–47; *Uhlman* v. *New York Life Insurance Co.*, 109 N. Y. 421; *Greeff* v. *Equitable Life Assurance Society*, 160 N. Y. 19. The rights of the policyholders to dividends and to control over the assets of the corporation are similar to the rights of stockholders in a stock corporation. See *Mayer* v. *Attorney General*, 32 N. J. Eq. 815. As the Circuit Court of Appeals observed, "While it is true that each policy provides for the declaration of those profits in

the form of dividends, it is rather as a charter—also a contract—provides for the declaration of dividends to shareholders in a stock company." (R. 187.) We find nothing in the insurance laws of New York indicating that the items in question should be considered as liabilities. The provisions of law as to when a life insurance company is to be deemed insolvent, when a mutual company may be forced to discontinue business, when a receiver shall be appointed, and as to the manner of valuing its assets and liabilities give no intimation that any of these items is to be considered as a liability. See Sections 21, 43, 82, and 86 of the New York insurance laws, pp. 89–91, *infra*. See also Section 83, which provides for the distribution of *surplus* to policyholders, and Section 87 limiting the amount of a contingency reserve which a company can maintain (pp. 90–92, *infra*).

As the three items differ from each other somewhat in their characteristic details, we will analyze them. Inasmuch as the taxes for four separate years are in controversy and the fundamental facts are the same for all years, we will discuss the items as they appear in the statement as of December 31, 1917. As Section 1000 imposes the tax on the surplus, etc., "as of the close of the preceding accounting period used by such company for purposes of making its income-tax return," and as this company made its income-tax return for the calendar year, the condition of its assets on December 31,

1917, governs the capital-stock tax for the first of the years involved—that beginning July 1, 1918.

Item 35 represented dividends declared or apportioned to annual dividend policies. These dividends were payable in 1918, and they were not declared until January 14, 1918. Consequently, Item 35 had no existence as a separate item at the end of 1917; and, at least until the directors acted some time later, the sum represented by it was merely an undesignated part of the general assets of the corporation. Until the directors acted, no policyholder had any claim to any distinct amount. The amount was appropriated from the account designated by the company as its "Undivided Surplus Account." This account was made up by adding the profits for 1917 to an amount taken from another account designated by the company as "Latent Fund for Contingencies and Dividends."

Item 36 was the amount of dividends declared or apportioned to deferred dividend policyholders payable to them during 1918. It came out of the "Interim Accumulation Fund." (The facts in regard to the "Interim Accumulation Fund" are summarized on page 10, *supra*, and the nature of this fund is also discussed on pages 44–45, below.) Although, in the normal course, all of Item 36 would be paid out during 1918 as dividends to holders of deferred dividend policies, no policyholder became entitled to a payment unless his policy was in force and he was alive at the expira-

tion of the distribution period, which would occur sometime during 1918. If his policy should lapse or he should die before that time, the amount to which he would have been entitled would go to other policyholders of the same class. Until the declaration of this dividend shown in Item 36, on January 14, 1918, no definite amount was set aside even for the group.

Item 37, the "Interim Accumulation Fund," in the statement as of December 31, 1917, consisted of amounts which had been allocated to the fund by annual appropriations of many years, including that of January 14, 1918. No policyholder or class of policyholders would have any right to any definite amount from this fund, at least until part of it was apportioned for distribution, and the first such apportionment would not be made until the early part of 1919.

We submit that the creation of the "Interim Accumulation Fund" had no legal effect. It was maintained merely to show the result of the calculations and determinations of the directors and officers of the company over a period of years. If unforeseen events should occur, the amount represented by this item could, if necessary, have been devoted to the payment of life insurance on policies which matured unexpectedly, as well as to the payment of other valid claims against the company. The same is true, we submit, of Items 35 and 36—certainly on December 31, 1917, before the divi-

dends represented by them had been declared. Not until the dividends were declared could any policyholder maintain an action to recover the dividend if the company had refused to pay it. Consequently, the amounts represented in Items 35 and 36 up to the time of the declaration of the dividend and the amounts represented in Item 37 at all times were subject to no different obligations than they would have been had they been carried in a single account entitled simply "surplus" or in the "Security Fluctuation and General Contingency Fund" which appears in the annual statement under Item 38. It is significant that the last-mentioned fund was drawn upon for the payment of part of these dividends, and it would seem that the duties of the directors as to the handling of that fund were not substantially different from their duties in regard to the surplus for any particular year. All of these funds alike were subject to distribution to policyholders proportionately to such extent as the directors felt it safe to diminish these funds.

It is not without significance, we believe, that the directors of the company expressly referred to the account from which these various dividend items were appropriated as "surplus." Thus, the resolution which appropriated $12,437,514 to the annual dividend policyholders during the year 1918 (Item 35) provided that (R. 47)—

> the remainder of the *surplus*, being the amount of $12,437,514.00, be appropriated from the *Undivided Surplus Account*, out of which shall be paid to those policies which participate annually in *surplus* on their anniversaries in 1918, a dividend * * *. (Italics ours.)

On the same day the directors set aside part of their funds to be held for the benefit of deferred dividend policyholders. By resolution it was provided that (R. 59)—

> $33,846,861.64 be credited to the Interim Accumulation Fund. The balance of the latter account will then be equal to $121,165,327.64, this being the Reserve to be held by the Company, as shown in Schedule D of the Actuaries' Report as to the disposition of the *surplus*, * * *. (Italics ours.)

Of the sum of $121,165,327.64 thus set aside from surplus for deferred dividends, the sum of $14,123,549.64 was declared as dividends payable to deferred dividend policyholders during 1918. This sum constitutes Item 36. The balance of the total sum, $107,041,778, held for the benefit of deferred dividend policyholders, whose right to dividends mature in future years, constitutes Item 37 of the company's annual report. (R. 50-51.)

The company's charter, its policies, and the agreed statement of facts, as well as the annual report of the officers to the directors, designate the

earnings during the year which are to be divided as "Surplus" or "Divisible Surplus." (R. 40–43, 61.)

Furthermore this Court has designated the funds which went into the items now under consideration as "surplus." In *New York Life Insurance Company* v. *Edwards*, 271 U. S. 109, 115, this Court said, concerning the present taxpayer—

> At the end of each year the actual insurance costs and expenses incurred are ascertained. The difference between their sum and the total of advanced payments and other income then becomes the "overpayment" or *surplus* fund for immediate *pro rata* distribution among policyholders as dividends or for such future disposition as the contracts provide. (Italics ours.)

And it has been held that dividends paid by a mutual life insurance company can be paid only from "surplus" and that funds held by such a company for the payment of dividends are "surplus." See *Fuller* v. *Metropolitan Life Ins. Co.*, 70 Conn. 647.

We submit that these designations of these items as appropriations or dispositions of "surplus" were correct.

To summarize, the three items were not liabilities except in an accounting sense, and they were analogous to surplus or undivided profits of a stock corporation.

The tax should be measured by business and financial realities and not by bookkeeping forms or mere names. *Hecht* v. *Malley*, 265 U. S. 144, 163.

Apparently there have been no decisions of any court, except those of the courts below in the instant case, construing the provisions of Section 1000 (c).[14] The Treasury Department has always construed them as requiring the inclusion of the three items in question.[15] It is also significant that the Treasury Department, in computing invested capital of mutual life insurance companies for purposes of the profits tax (under Section 207 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 306, and under Section 326 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1092) allowed the taxpayer the

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[14] Except *Metropolitan Life Ins. Co.* v. *United States*, 65 C. Cls. 149, which relates to an entirely different question under this section.

[15] No formal regulations to this effect appear to have been promulgated, but Law Opinion 1104, rendered by the Solicitor of Internal Revenue and approved by the Commissioner, published in I–2 Cumulative Bulletin (July–December, 1922), page 331, expressly decides this point. (This opinion is printed as Appendix D, pp. 80–88, *infra*.) The regulations relating to the capital-stock tax provided specifically that the tax should apply to mutual insurance companies; the language of the regulations is substantially the same as that used in the statute. See Articles 61 and 62 of Regulations 50, promulgated April 29, 1919, and Articles 23 and 24 of Regulations 50 (revised), promulgated June 21, 1920 (*infra*, pp. 78–79).

benefit of including the items in question as "paid in or earned surplus and undivided profits."[16]

The Commissioner, computing the basis for the capital stock tax, deducted from the total admitted assets as of December 31, 1917, all items appearing in that schedule in the annual statement to the Insurance Superintendent, designated as "V—Liabilities, Surplus and Other Funds," except Items 35, 36, 37, 38, 39, 47, and 48 (See R. 169–173). This form included 48 different items. Item 47 was designated "Capital paid up" and Item 48 "Unassigned funds (surplus)." In each year the company entered "0" opposite Items 47 and 48. The items which the Commissioner deducted included not

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[16] See Bulletin H, Income Tax Rulings Peculiar to Insurance Companies, published by Bureau of Internal Revenue, April 9, 1921, paragraphs 11 and 12; and *Mutual Benefit Life Insurance Co.* v. *Duffy*, 295 Fed. 881, 890 (D. N. J.). (This case was affirmed as to the point there in controversy, 3 F. (2d) 1020; 268 U. S. 686.)

The language of Section 1000 (c) was evidently patterned on that of Regulations 41, promulgated February 4, 1918, under the profits tax provisions of the Revenue Act of 1917, Art. 65 of which provided in part as follows:

"*Invested capital of insurance companies.* (a) The invested capital of a *mutual insurance company* will be deemed to consist of the sum of (1) any surplus or contingent reserves maintained for the general use of the business, plus (2) any legal [sic] reserves the net additions to which are included in the net income subject to the tax—subject to the restrictive provisions of Article 44 requiring the exclusion of tax-free assets other than obligations of the United States."

only legal reserves but also numerous reserves for various liabilities. The Commissioner also deducted the statutory exemption of $5,000 and a large amount claimed by the company as the difference between book value of assets and market value of assets. The deduction required to bring the assets down to such market value, which was considerably less than the market value as figured in the statements to the Insurance Superintendent, in each year more than equalled the total amount shown in Items 38 and 39, and the tax was consequently based upon a valuation which was somewhat less than the aggregate amount of Items 35, 36, and 37.

(2) If the items in question do not come within the description of "surplus as to contingent reserves maintained for the general use of the business," Item 37 at least comes within the description "any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income-tax return"

It is true that the word "reserves" in its technical sense would not include any of the items in question. See *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 350–352. But it can not have this meaning in the last category mentioned in Section 1000(c) because there are no reserves in the strict sense "the net additions to which are included in net income under the provisions of Title II." It is noteworthy that in the resolutions of the directors (R. 62, 66, 70, 73–74), the "Interim Accumulation Fund" is characterized as a "Reserve."

We submit that it was in fact a "reserve" as that word was used in the statute, and that it was properly used by the Commissioner as a basis for assessing the capital stock tax, since it was a reserve the net addition to which was included in net income.

The only deductions from net income for purposes of income tax peculiar to life insurance companies were those provided in Section 233 (a) (1) and Section 234 (a) (10) of the Revenue Act of 1918. Section 233 (a) (1) provided:

> In the case of life insurance companies there shall not be included in gross income such portion of any actual premium received from any individual policyholder as is paid back or credited to or treated as an abatement of premium of such policyholder within the taxable year.

Section 234 (a) (10) provided for the deduction of—

> The net addition required by law to be made in the taxable year to reserve funds * * * and the sums other than dividends paid within the taxable year on policy and annuity contracts; * * *.

Under Section 233 (a) (1) the amount shown in the annual statement of one year as Item 35 was deductible from gross income of the following year, and this sum was in fact deducted from gross income. (R. 60.) Likewise, under the same section, and under the decision in *Penn Mutual Insurance Co.* v. *Lederer*, 252 U. S. 523, so much of Item 36 (appearing in the report of December 31, 1917)

as was equivalent to the amount received in 1918 as premiums from those deferred dividend policyholders who received dividends during 1918 could be excluded from gross income for the year 1918, and under this provision 4% of Item 36 was in fact so excluded from the taxable gross income. (R. 60.)

But no part of Item 37, the "Interim Accumulation Fund," was excluded from gross income. (R. 60.) And since that fund was not a legal reserve fund to which additions were required to be made by law, the net additions to it were not excludable from gross income under Section 234 (a) (10).

In *New York Life Insurance Co.* v. *Edwards, Collector,* 271 U. S. 109, the Court held that the redundancy of the deferred dividend policyholders' payments of premiums which were not returned to them during the taxable year in question could not be deducted in computing the income tax. The Court said (p. 116):

> * * * Here it is insisted that within the meaning of the quoted provision each deferred dividend policyholder's overpayment was actually credited to him during the year; but we can not accept this theory. The aggregate of all such payments was held for distribution among policyholders alive at the end of the period. The receipts for the year were not really diminished.

Consequently, the sums appearing in the annual statement each year as Item 37 were "reserves, the net additions to which are included in net income"

as that term is used under Section 1000 (c) of the Revenue Act of 1918. We submit that if the "Interim Accumulation Fund" did not constitute "surplus," it must be regarded as "reserves."

Counsel for the taxpayer in his brief has asserted that the tax upon it is enormous and has given figures showing the value of the capital stock of certain other stock companies which were mutualized.[17] Counsel and the Circuit Court of Appeals assert that the Act, as applied by the Commissioner, results in inequality between mutual and stock companies. If Congress has imposed on mutual companies a tax which operates in this way, the question of fairness of the tax and discrimination between stock companies and mutual companies is immaterial. But in view of these assertions, it may not be out of place for us to point out that such generalizations as we are able to make about the matter seem to negative these conclusions. During the years in question apparently there were no very large stock life insurance companies—none in any way comparable in size to the New York Life Insurance Company. The Bureau of Internal Revenue has, at our request, prepared a table designed to show the operation of the tax as to mutual companies and stock

[17] No information in regard to these matters appears in the record, and we have not attempted to ascertain the significance of this matter or the explanations for it. The whole argument seems to us inadmissible.

companies of approximately the same size. In order to make this comparison, it has compared with twelve stock companies twelve mutual companies of approximately the same size as determined by gross assets during one of the years here involved, i. e., 1921. We realize, of course, that the comparison which it affords is necessarily rough, and there may be ground for many explanations and distinctions. But the significant ultimate fact to be deduced from the comparison is that, although the total gross assets of the twelve mutual companies which appear in the table substantially exceeded the total gross assets of the stock companies appearing thereon, the total capital stock taxes of the mutual companies (computed in accordance with our contention herein) were less than those paid by the stock companies. And the tax paid by the New York Life Insurance Company is comparable to that paid by the stock companies in proportion to the amount of the gross assets of the companies.

(B) The items in question are not excluded by Section 1000 (b)

The taxpayer here contends that the provisions of paragraph (b) of Section 1000 of the Revenue Act of 1918 apply to mutual insurance companies, and, therefore, since the company is required by contract to maintain or hold its surplus for apportionment among its policyholders, such surplus must be excluded from the basis for determining the tax. This paragraph provides:

> In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

We contend that this paragraph is not applicable to mutual companies, and both courts below so held.

The meaning of the language used in Section 1000 of the Revenue Act of 1918 may be clarified by an examination of the history of the capital stock-tax provision. Section 407 of the Revenue Act of 1916 (*infra*, pp. 59–60) placed a special excise tax upon corporations, including insurance companies, and fixed the value of the capital stock as the measure of the tax. Since mutual insurance companies have no capital stock, the Treasury Department at first ruled that they were not taxable under that section. See Article 2 (b) of Regulations 38, promulgated October 19, 1916, under the Revenue Act of 1916.[18]

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[18] This article reads as follows:

"Inasmuch as the basis of tax is the fair value of the stock of a corporation, mutual insurance companies and other associations not having capital stock represented by shares will also be exempt from tax, in the absence of a basis for the computation of the tax."

By Article 3 of Regulations 38 (Revised), promulgated August 9, 1918 (*infra*, p. 77), this ruling was reversed and it was provided that mutual insurance companies were subject to the tax. The District Court for the District of Massachusetts has recently sustained this regulation and held that a mutual fire insurance company was subject to the capital stock tax under the 1916 Act. *Lumber Mutual Fire Ins. Co.* v. *Malley* (D. Mass., decided December 1, 1930, not yet reported).

When H. R. 12863, 65th Congress, 3d Session, which later became the Revenue Act of 1918, passed the House, Section 1000 was substantially the same as Section 407 of the Revenue Act of 1916. When the bill reached the Senate there were substituted (Amendment No. 186) in lieu of Section 1000, Sections 245, 246, and 247, placing a tax upon the income of insurance companies. As affecting other corporations, the Finance Committee of the Senate recommended that Section 1000 be so amended as to make the basis of the tax the amount of the net assets of the corporation as shown by its books. Senate Report No. 617, at pp. 17–18 (*infra*, p. 69). In conference, Sections 245, 246, and 247, as added by the Senate, were eliminated. See comment on Amendment No. 186 in House Report 1037, 65th Congress, 3d Session, p. 60 (*infra*, p. 70). Section 1000 was restored to its original form except that paragraph (c) was amended by adding the provision making the tax specifically applicable to mutual insurance companies. See comment on Amendments Nos. 488–492 in House Report 1037, p. 84 (*infra*, pp. 70–72).

There can be no doubt that Congress intended to impose a tax upon mutual insurance companies, and that the specific language of paragraph (c) was added to remove the doubt on this question which had existed under the 1916 Act. The provisions of paragraph (b) were taken with substan-

tially no change from Section 407 of the Revenue Act of 1916 (*infra*, p. 59) and were included in Section 1000 of H. R. 12863, *supra*, as it passed the House. As shown by the legislative history, paragraph (c) was added to Section 1000 by the conference committee as a special provision applying to mutual insurance companies. It would seem clear, therefore, that paragraph (b) was intended to apply only to insurance companies having capital stock, while paragraph (c) prescribes the basis for determining the tax to be imposed upon mutual insurance companies having no capital stock. Otherwise mutual insurance companies would again be likely to escape taxation, and the provisions of paragraph (c) would be nullified.

The arrangement of the provisions of Section 1000 (printed in full on pp. 61–62 *infra*) also indicates that provisions of paragraph (b) do not qualify the provisions of paragraph (c). The parts of paragraph (c) in question are isolated from (b) by another provision so wholly distinct that its placement there would be unreasonable if what followed it were intended to refer back to what preceded it. But in any event the more specific provisions of (c) would supersede those of (b) rather than be limited by those of (b). Fair interpretation often requires that one of two provisions be read broadly enough to override the other rather than be limited to a meaning not inconsistent with the other.

CONCLUSION

We maintain that the judgment of the Circuit Court of Appeals as affecting the tax for the first three periods involved should be affirmed, but that as relating to the tax for the fourth period it should be reversed.

Respectfully submitted.

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FEBRUARY, 1931.

APPENDIX A

STATUTES INVOLVED

The Revenue Act of 1916, c. 463, 39 Stat. 756, 789–790, 792, provided in part as follows:

SPECIAL TAXES

SEC. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:

Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: *Provided,* That in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included. The amount of such annual tax shall in all cases be computed on the basis of the fair

average value of the capital stock for the preceding year: *Provided,* That for the purpose of this tax an exemption of $99,000 shall be allowed from the capital stock as defined in this paragraph of each corporation, joint-stock company or association, or insurance company: *Provided further,* That a corporation, joint-stock company or association, or insurance company, actually paying the tax imposed by section three hundred and one of Title III of this Act shall be entitled to a credit as against the tax imposed by this paragraph equal to the amount of the tax so actually paid: *And provided further,* That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, or which is exempt under the provisions of section eleven, Title I, of this Act.

* * * * *

SEC. 409. That all administrative or special provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this title, and every person, firm, company, corporation, or association liable to any tax imposed by this title, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1126, provided in part as follows:

TITLE X.—SPECIAL TAXES

SEC. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth.

(b) In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

(c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231. The taxes imposed by this section shall

apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return. *Provided,* That in the case of a foreign mutual insurance company the tax shall be equivalent to $1 for each $1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return.

(d) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section.

* * * * *

SEC. 1305. That all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act, and every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

The Revenue Act of 1921, c. 136, 42 Stat. 227, 261, 294, 295, 320, 321, provided in part as follows:

TAXES ON INSURANCE COMPANIES

* * * * *

SEC. 243. That in lieu of the taxes imposed by sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows:

(1) In the case of a domestic life insurance company, the same percentage of its net income as is imposed upon other corporations by section 230;

(2) In the case of a foreign life insurance company, the same percentage of its net income from sources within the United States as is imposed upon the net income of other corporations by section 230.

* * * * *

TITLE X.—SPECIAL TAXES

CAPITAL STOCK TAX

SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June 30.

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231, nor to any insurance company subject to the tax imposed by section 243 or 246.

(c) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section.

* * * * *

TITLE XIV.—GENERAL PROVISIONS

REPEALS

SEC. 1400. (a) That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

Title II (called "Income Tax") as of January 1, 1921;

Title III (called "War-Profits and Excess-Profits Tax") as of January 1, 1921;

Title IV (called "Estate Tax") on the passage of this Act;

Title V (called "Tax on Transportation and Other Facilities, and on Insurance");

Sections 628, 629, and 630 of Title VI (being the taxes on soft drinks, ice cream, and similar articles);

Title VII (called "Tax on Cigars, Tobacco, and Manufactures Thereof");

Title VIII (called "Tax on Admissions and Dues");

Title IX (called "Excise Taxes");

Title X (called "Special Taxes");

Title XI (called "Stamp Taxes");

Title XII (called "Tax on Employment of Child Labor") as of January 1, 1921; and

Sections 1314, 1315, 1316, 1317, 1319, and 1320 of Title XIII (being certain administrative provisions) on the passage of this Act.

(b) The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act. The unexpended balance of any appropriation heretofore made and now available for the administration of any such part of the Revenue Act of 1918 shall be available for the administration of this Act or the corresponding provision thereof.

Section 13 of the Revised Statutes (U. S. C., Title 1, Sec. 29) provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The Act of October 1, 1890, c. 1244, Sec. 53, 26 Stat. 567, 624 (U. S. C., Title 26, Sec. 186), provides in part as follows:

> That all special taxes shall become due on the first day of July, eighteen hundred and ninety-one, and on the first day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced to the first day of July following. * * * And it shall be the duty of special taxpayers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence, as provided for in section three thousand one hundred and seventy-six of the Revised Statutes.

APPENDIX B

REPORTS OF CONGRESSIONAL COMMITTEES

REVENUE ACT OF 1916

The report of the Committee on Finance to the Senate (Senate Report No. 793, 64th Congress, 1st Session, p. 7) contains the following:

> Your committee recommends a license tax of 50 cents upon each thousand dollars of capital, surplus, and undivided profits of corporations, with an exemption of $99,000 of the capital, surplus, and undivided profits of each corporation. The committee amendment also exempts from this tax corporations actually paying the tax imposed by section 41, Title III, of this act (munitions tax) to an amount not in excess of the munitions tax so actually paid. It also provides that this tax shall not be imposed upon any corporation not engaged in business or which had no net income as defined in Title I of this act during the preceding taxable year, or which was exempt under the provision of section 11, Title I, of this act (income tax).

The Conference Report (House Report No. 1200, 64th Congress, 1st Session, p. 37) contains the following:

> Amendment No. 206: The Senate provides that corporations, joint-stock companies, and associations shall pay 50 cents for each $1,000 of capital stock, surplus, and undivided profits used in any of the activities

or functions of their business, including such sums of capital stock, surplus, and undivided profits as may be invested in or loaned upon stocks, bonds, mortgages, real estate, or other securities. The House recedes from its disagreement to this amendment with an amendment providing as follows: "Every corporation, joint-stock company, or association now or hereafter organized in the United States for profit and having a capital stock, and every insurance company now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business of such corporation, joint-stock company, or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock, and in estimating the amount of capital stock, surplus and undivided profits shall be included." The amendment further provides that in the case of an insurance company, such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included in assessing the tax upon the fair value of the capital stock. The amendment allows an exemption of $99,000 from the capital stock. The amendment further provides that a nonresident corporation doing business in the United States shall pay a tax equivalent to 50 cents for each $1,000 of the capital actually invested in the transaction of this business in the United States, and contains the exemption for nonresident insurance companies the same as that given resident insurance companies. It also allows a deduction for nonresident companies,

from the amount of capital so invested, equal to such proportion of $99,000 as the amount so invested bears to the total amount invested in the transaction of business in the United States or elsewhere.

Revenue Act of 1918

The report of the Committee on Finance of the Senate (Senate Report No. 617, 65th Congress, 3d Session, pp. 9, 17–18) contains the following:

LIFE INSURANCE COMPANIES

A new basis is recommended for the taxation of life insurance companies (Pt. IV, secs. 245, 246, 247). The tax is in form an income tax, but is imposed upon a net income defined with special reference to the peculiar conditions of the business of life insurance. Roughly, it consists of the gross income from interest, dividends, and rents less tax-free interest, investment expenses, and taxes and other expenses paid exclusively in connection with real estate owned by the company. In the case of a domestic life insurance company there is also a specific deduction of $2,000. Thus the tax falls upon the true income of the company; that is, its income from investments; and the rate is so fixed that this tax takes the place of the income tax, war excess-profits tax, capital-stock tax, and the tax on the issuance of policies. It will yield considerably more revenue than the taxes which it is designed to replace, and has the great merit of simplicity and certainty. Above all, it avoids the almost insuperable difficulty of defining the invested capital of a life insurance company for purposes of the war excess-profits tax.

* * * * *

The House bill provided for the continuance of the capital-stock tax on the basis of the fair average value of the capital stock of the corporation for the preceding year. The determination of fair average value has proved in administration to be very difficult. The committee has accordingly provided that the basis of the tax shall be the amount of the net assets of the corporation as shown by its books. It is believed that this basis of levying the tax is just and that the change will not lead to any reduction of the revenue from this source.

The report of the Conference Committee (House Report No. 1037, 65th Congress, 3d Session, pp. 36, 60, 84) contains the following:

Amendment No. 186: This amendment added a new "Part" to the income-tax title and provided a separate tax on the investment income of life insurance companies and mutual insurance companies in lieu of all other taxes imposed in the bill upon such companies; and the Senate recedes.

* * * * *

Amendment No. 488: The House bill imposed upon a domestic corporation an annual excise tax equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year as is in excess of $5,000. It also provided that in estimating the value of the capital stock the surplus and undivided profits should be included. This is the basis of the tax under the present law, with the rate increased 100 per cent. The Senate amendment changes the basis of the tax from the fair average value of the capital stock to the

amount of the net assets shown on the books as of the close of the preceding income-tax year; and the Senate recedes.

Amendment No. 489: The House bill based the capital stock tax in the case of foreign corporations upon the average amount of "capital actually invested" in the United States. The Senate amendment changes this basis and places this tax upon the average amount of "capital employed" in the United States; and the House recedes.

Amendment No. 490: This amendment, as part of the Senate's general plan of insurance taxation, strikes out the House provisions relating to the computation of the capital stock tax in the case of insurance companies; and the Senate recedes.

Amendment No. 491: This amendment is a clerical change; and the Senate recedes.

Amendment numbered 492:

That the House recede from its disagreement to the amendment of the Senate numbered 492, and agree to the same with an amendment as follows:

In lieu of the matter inserted by said amendment insert a period and the following: *The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: Provided, That in the case of a foreign mutual insurance company the tax shall be equivalent to $1 for each $1,000 of the same*

proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return; and the Senate agree to the same.

Amendment No. 492: This amendment, as part of the Senate's general plan of insurance taxation, specifically exempts insurance companies from the capital stock tax. The House recedes with an amendment making the tax specifically applicable to mutual insurance companies and providing that in the case of every such domestic company the tax shall be based upon the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in the net income under the provisions of Title II, as of the close of its preceding income tax year; and providing that in the case of a foreign mutual insurance company the tax shall be based upon the same proportion of the sum of such surplus and reserve, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted.

Revenue Act of 1921

The report of the Committee on Ways and Means to the House (House Report No. 350, 67th Congress, 1st Session, p. 14) contains the following:

LIFE INSURANCE COMPANIES

Sections 242–246: The provisions of the present law applicable to life insurance companies are imperfect and productive of con-

stant litigation. Moreover, the taxes paid by life insurance companies under the income tax are inadequate. It is accordingly proposed in lieu of all other taxes to tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deduction for expenses fairly chargeable against such investment income. The new tax would yield a larger revenue than the taxes which it is proposed to replace.

The report of the Committee on Finance to the Senate (Senate Report No. 275, 61st Congress, 1st Session, pp. 20, 30) contains the following:

TAXES ON LIFE INSURANCE COMPANIES

Sections 242–246 provide a new plan for the taxation of life insurance companies, substantially similar to the plan embodied in the revenue act of 1918 as first adopted by the Senate. The provisions of the present law applicable to life insurance companies are imperfect and productive of constant litigation. The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income. The new tax would take the place of the present income and excess-profits taxes for the year 1921, and life insurance companies would share with other insurance companies in the repeal in the year 1922 of the capital stock tax and the taxes imposed by section 503. The new tax will yield a larger revenue than the taxes which it is proposed to replace.

* * * * *

REPEAL OF CAPITAL-STOCK TAX

Section 1000 provides for the repeal of the capital-stock tax imposed by section 1000 of the revenue act of 1918 after June 30, 1922.

APPENDIX C

REGULATIONS OF THE TREASURY DEPARTMENT

Regulations 38, promulgated October 19, 1916, under the capital stock tax provisions of the Revenue Act of 1916, provided in part as follows:

CORPORATIONS EXEMPT

CORPORATIONS AND ASSOCIATIONS EXEMPT

ART. 2. (*a*) The following corporations, joint-stock companies or associations, or insurance companies, which are exempt from income tax under the provisions of section 11, Title I, are also specifically exempt from the capital-stock tax under section 407, Title IV, of this act:

* * * * *

MUTUAL COMPANIES EXEMPT

(*b*) Inasmuch as the basis of tax is the fair value of the stock of a corporation, mutual insurance companies and other associations not having capital stock represented by shares will also be exempt from tax, in the absence of a basis for the computation of the tax.

RETURNS

* * * * *

ART. 3. (a) Section 3237, Revised Statutes, as amended by section 53 of the act of October 1, 1890 (26 Stats., 567) provides

"that all special taxes shall become due on the 1st day of July, 1891, and on the 1st day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately from the 1st day of the month in which the liability to a special tax commenced to the 1st day of July following." The capital-stock tax, therefore, which becomes effective January 1, 1917, will be payable in January, 1917, on returns to be made during that month for the six months ending June 30, 1917. In July, 1917, and annually in July thereafter, returns must again be made and the tax paid for the ensuing fiscal year.

* * * * * *

Regulations 38 (Revised), promulgated August 9, 1918, under the capital-stock tax provisions of the Revenue Act of 1916, provided in part:

ARTICLE 1. *Due date.*—The tax became effective January 1, 1917, and is to be paid annually in advance for each year beginning July 1, except as to the first payment for the six months ending June 30, 1917. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see Article 11. No tax is refundable if a corporation ceases to do business during the year.

* * * * * *

ART. 3. *Scope of tax: Insurance companies.*—The tax also applies to insurance companies which are organized under a statute or derive from that source some quality or benefit not existing at the common law, irrespective of whether or not they are organized for profit or have a capital stock represented by shares. Mutual and participating plan companies are included. A mutual protective association organized under a statute, whose only source of revenue is the assessments paid by its members and whose net income for each year is paid into a reserve fund, constituting the sole resource of the company, aside from current assessments, for the payment of losses, is an insurance company within the meaning of the statute.

Regulations 50, promulgated April 29, 1919, under the capital-stock tax provisions of the Revenue Act of 1918, provided in part:

ARTICLE 1. *Due date of tax.*—The tax became effective as of July 1, 1918, and is to be paid annually in advance for each year beginning July 1, in lieu of the capital-stock tax imposed by the Revenue Act of 1916. The tax for the first year ending June 30, 1919, although necessarily not payable in advance, must be paid upon notice and demand by the collector. See article 111. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see article 51. No tax is re-

fundable if a corporation ceases to do business during the year.

* * * * *

ART. 61. *Mutual insurance company.*—The tax applies to domestic and foreign mutual insurance companies. A mutual protective association organized under a statute, whose only source of revenue is the assessments paid by its members and whose net income for each year is paid into a reserve fund, constituting the sole resource of the company, aside from current assessments, for the payment of losses, is an insurance company within the meaning of the statute. A voluntary unincorporated association of employees formed for the purpose of relieving sick and aged members and the dependents of deceased members is an insurance company, whether the fund for such purpose is created wholly by membership dues or partly by contributions from the employer.

ART. 62. *Domestic mutual insurance company—rate of tax.*—The tax is $1 for each full $1,000 of the excess over $5,000 of the sum of (a) the surplus or contingent reserves maintained for the general use of the business and (b) any reserves the net additions to which are included in net income for the purpose of the income tax, in both cases figured as of the close of the last taxable year of the company. The net addition required by law to be made within the taxable year to reserve funds, including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds and, in the case of corporations issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium

payment plan continuing for life and not subject to cancellation, including such portion of the net addition not required by law made within the taxable year to reserve funds as is needed for the protection of the holders of such combination policies, is not included in net income for the purpose of the income tax. See Regulations 45 and particularly articles 568–570 thereof.

In Regulations 50 (Revised), promulgated June 21, 1920, under the capital stock tax provisions in the Revenue Act of 1918, Articles 1, 23, and 24 are substantially the same as Articles 1, 61, and 62, respectively, of Regulations 50 set out above.

Regulations 64 (1922 ed.) promulgated June 15, 1922, under the capital stock tax provisions of the Revenue Act of 1921, provided in part:

ARTICLE 1. *The law.*—The main provisions of existing law with respect to this tax are embodied in section 1000 of the Revenue Act of 1921, referred to hereinafter as the act.

ART. 2. *Due date of tax.*—The act was approved November 23, 1921, but the tax is effective from July 1, 1922, except upon the incorporation of an individual or partnership business (see art. 32). This is a special tax and like all special taxes is due and payable annually in advance from July 1 of each year. No portion of the tax so paid is refundable to a corporation which ceases to do business during the year.

APPENDIX D

LAW OPINION 1104

Law Opinion 1104, rendered by the Solicitor of Internal Revenue and approved by the Commission, published in I-2 Cumulative Bulletin (July-December, 1922), p. 331, is as follows:

LIABILITY OF MUTUAL LIFE INSURANCE COMPANIES TO CAPITAL-STOCK TAX

Informal request has been made for a reconsideration of Solicitor's Opinion 101 and Law Opinion 1078, relative to the liability of mutual life insurance companies to capital-stock tax under the provisions of section 1000 of the Revenue Act of 1918. It is requested that a single opinion be written which will supersede Solicitor's Opinion 101 and Law Opinion 1078, and which will within itself declare the proper method of assessing and collecting such capital-stock tax.

* * * * *

Four distinct questions are involved:

I

Certain mutual life insurance companies claim that in computing the capital-stock tax, paragraph (b) of section 1000 is applicable, irrespective of whether paragraph (c) is to be applied. Opinion is requested as to the correctness of this contention.

It has been suggested that paragraph (b) applies only to nonmutual companies and paragraph (c) to mutual companies.

II

It is contended by the companies that they should be assessed on the market value of their assets, and that the depreciation, below the amortized value, of assets carried in their reserves, whether required or not required, should be deducted in estimating the amount of the taxable surplus.

III

The companies contend that certain funds set up to meet certain dividend charges are exempt from tax because they are funds held for payment to certain policyholders and are not surplus or contingent reserves maintained for the general use of the business nor reserves the net additions to which are included in net income for income tax purposes.

IV

It further appears that the N Company is peculiar in that there is still outstanding 100x dollars of its capital stock. Dividends on this stock are limited by charter to 7 per cent. Although nominally a stock company, it is operated entirely on a mutual basis and is to all intents and purposes a mutual company. Opinion is requested as to whether or not this company should be classed as a mutual company or as a nonmutual company.

Paragraph (c) of section 1000 subjects to tax those reserves "the net additions to which are in-

cluded in net income under the provisions of Title II." The provisions of Title II referred to are found in paragraph (a) (10) of section 234 (supra). Under section 234(a) (10) "The net addition required by law to be made within the taxable year to reserve funds" is deductible in computing net income. Apparently "included in net income" is intended to mean "not deductible from gross income in computing net income."

The four questions stated above should be decided as follows:

I

The tax imposed by section 1000 of the Revenue Act of 1918 is a capital-stock tax and its provisions are designed generally to tax corporations having a capital stock divided into shares. Mutual insurance companies have, properly speaking, no capital stock represented by shares and are cooperative as distinguished from stock companies organized for profit. For this reason Congress has provided for the taxation of mutual insurance companies a rule different from that laid down in paragraphs (a) and (b). This rule is found in sentences quoted from paragraph (a). It is, therefore, held that nonmutual insurance companies should be assessed under the provisions of paragraphs (a) and (b) of section 1000 of the Revenue Act of 1918, and that mutual insurance companies should be assessed under the provisions of paragraph (c) of said section. This construction of the statute is the one adopted in articles 22 and 23 of Regulations 50 (revised).

The ruling herein made works an apparent hardship upon certain mutual insurance companies and

especially upon those which have large deferred dividend reserves. Such companies must include such reserves in their surplus if they are held subject to tax under the provisions of paragraph (c). Stock companies, on the other hand, which are liable to tax under the provisions of paragraph (b), are not liable to tax upon such portion of their surplus as is included in such deferred dividend reserve. This inequality of the tax burden is inherent in the taxing statute and can not be removed by interpretation.

In L. O. 1032 it was held in construing section 38 of the Act of August 5, 1909, and paragraph G (a) and (b) of the Act of October 3, 1913, that the words "reserve fund 'required by law' included not only reserves required by express statutory provisions, but also reserves required by the rules and regulations of State insurance departments, when promulgated in the exercise of an appropriate power conferred by statute; but do not include assets required to be held for the ordinary running expenses of the business, such as taxes, salaries, reinsurance, and unpaid brokerage." Under the language of the Act of 1909, companies may "deduct the net addition, if any, required by law to be made within the year to reserve funds." The language of the Act of 1913 is "by deducting * * * the net addition, if any, required by law to be made within the year to reserve funds." The language of the Act of 1916 is "by deducting * * * the net addition, if any, required by law to be made within the year to reserve funds." The language of these three Acts is almost identical with the language of section 234 (a) (10) of the

Act of 1918, and it is, therefore, held that the ruling of L. O. 1032 is applicable to the construction of Section 234 (a) (10) of the Revenue Act of 1918.

II

The contention of the mutual insurance companies that in making capital-stock tax returns they should be allowed to value securities held by them as investments at the market price instead of at the amortized value is believed to be sound. The capital-stock tax is imposed upon so much of the "fair average value" of the capital stock of a corporation for the preceding year ending June 30 as is in excess of $5,000. In estimating the fair average value of the assets of corporations other than insurance companies securities are valued at their fair market value. There does not appear to be any reason why the same rule should not be applied to insurance companies.

However, under the rule heretofore laid down in Solicitor's Opinion 101 and Law Opinion 1078, only the assets in excess of the amount of the legal reserves are permitted to be valued at their market value for capital-stock tax purposes. The mutual life insurance companies contend that there is no reason for the rule; that the reserves required to be kept under the various State insurance laws are based upon certain percentages of the amount of premiums paid in by policyholders; and that the amount of such reserves bear no relation whatever to the amount of the assets. It is, therefore, contended that the "fair average value" of the assets of mutual insurance companies should be the fair market value of their assets. It is contended that

if the securities were enhanced in value the Bureau would tax the whole increase and not merely that portion of the increase in excess of the legal reserves. This office has carefully reconsidered this contention and is of the opinion that it is well taken. It is held that the total admitted assets of mutual insurance companies should be valued at their fair market value before any deductions are made. Accordingly, in determining the amount of the assets upon which the capital-stock tax is to be assessed, there should be deducted from the market value of the total admitted assets the following amounts: (1) The debt liabilities, and (2) the legal reserves.

As a practicable matter the Unit may have considerable difficulty in distinguishing between the *debt* liabilities, the *reserve* funds, and the *surplus* of an insurance company. The reserve funds of a life insurance company ordinarily include only the net reserve (item No. 7),[1] the reserve to provide for accident and disability benefits in life policies (item No. 8), and the supplementary contract reserve (item No. 9). The debt liabilities include, among other items, the present value of amounts incurred but not yet due for total and permanent disability benefits, liabilities on policies canceled upon which a surrender value may be demanded, total policy claims, dividends left with the company to accumulate at interest, and amounts held to pay commissions, salaries, taxes, etc. (items Nos. 10–33, inclusive, and such portion of item No. 34 as is de-

[1] The item numbers referred to in this paragraph are those contained on page 5 of the annual statement, convention edition, now used in reporting to the State insurance department or commissioner.

clared unconditionally). The items shown in the liabilities statement of insurance companies consisting of amounts held to pay future dividends on annual and deferred dividend policies, held for security fluctuations and general contingency funds, annual dividend equalization funds, etc., constitute surplus or contingent reserves maintained for the general use of the business or reserves the net additions to which are not deductible from gross income in income tax returns (such as items Nos. 35, 36, 37, 47, 48, and such portion of item No. 34 as is not considered debt liabilities). Therefore, the amount of such surplus or reserves must be held to constitute a part of the capital stock of the company which is liable to the capital-stock tax. Whether the miscellaneous credit items Nos. 38 to 46, inclusive, will be considered legal reserves, debt liabilities, or taxable surplus will depend entirely on the nature of the credit accounts entered under these numbers.

III

The companies contend that the four funds named below should be deducted from the total assets in determining the amount of assets subject to the capital-stock tax: (1) Dividends declared on or apportioned to annual dividend policies; (2) dividends declared on or apportioned to deferred dividend policies; (3) dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums; (4) amounts set apart, apportioned, provisionally ascertained, calculated, declared, or held awaiting apportionment upon deferred dividend policies.

Except as indicated in the next succeeding paragraph, the companies' contention relative to these four funds must be denied. The net additions to these funds are not deducted from gross income in income tax returns. They are, therefore, surplus or reserves "the net additions to which are included in net income under the provisions of Title II" of the Revenue Act of 1918.

Most insurance companies set up on the liabilities side of their ledgers, either as a separate item or included in other items, an amount representing dividends which have been declared unconditionally; these dividends are due and payable * as of the close of the accounting period specified in section 1000 (c) of the Revenue Act of 1918. It is the opinion of this office that dividends so declared and so due and payable are deductible in determining the amount of assets upon which the capital-stock tax is to be imposed.

IV

It appears that it was expressly provided in the original charter of the N Company, granted in ——, that the business should be conducted upon the mutual plan and that all the surplus earnings and undivided profits over and above the dividends on the stock, losses, and expenses are and always have been accumulated and held for the benefit of the

* Counsel for the Government in the instant case construe this as we are informed it was construed by the Bureau, to relate to dividends which were payable before the end of the year for which the statement was made. This might relate to item 34, but it would not apply to item 35 or 36. (R. 94.) The case discussed by the Solicitor in this opinion was one in which company declared the dividend in the middle of the calendar year, and the dividend was payable before the end of the calendar year for which the statement was made.

policyholders. No surplus or undivided profits are distributed to the stockholders. Dividends on the stock are limited to 3½ per cent semiannually, and the taxpayer claims that the corporation, because it "transacts business on the mutual plan, is not required by section 407 of Title IV of the Act approved September 8, 1916, * * * to make the return called for by the Exhibit A, B, and C of Form 707."

* * * * *

From the statement of facts it appears that the control of the N Company has passed into the hands of the policyholders. The basis of its organization is mutuality, and it has been consistently referred to in various court decisions as a mutual insurance company.

There are a great many stock life insurance companies which transact business upon a mutual plan. Whether an insurance company should be classed as a stock company or a mutual company must depend upon the ultimate control of the affairs of the company. If the policyholders are in control, the basis of the organization is mutuality, and it should be classed as a mutual insurance company. If, on the other hand, the stockholders are in control, it should be classed as a stock company. This is a practicable rule which can be easily administered.

Solicitor's Opinion 101 and Law Opinion 1078 are superseded; Solicitor's Opinion 40 so far as inconsistent herewith is revoked.

CARL A. MAPES,
Solicitor of Internal Revenue.

Approved.

D. H. BLAIR,
Commissioner of Internal Revenue.

APPENDIX E

EXTRACTS FROM INSURANCE LAW OF NEW YORK, CONSOLIDATED LAWS OF NEW YORK, CHAP. 33, IN EFFECT 1916-1920 (McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, BOOK 27)

§ 21. *When corporation to be deemed insolvent.*—Every insurance corporation specified in articles two, three, four, and five of this chapter, whose assets and credits are not sufficient to reinsure its outstanding risks in a solvent insurance corporation, shall be deemed insolvent and may be proceeded against as an insolvent corporation.

§ 43. *Impaired mutual insurance corporations.*—If it appears to the superintendent from an examination made by him or by an examiner appointed by him that the assets or capital of any mutual insurance corporation are insufficient to justify its continuance in business, he shall determine the amount of such deficiency and issue a written requisition to the officers of the corporation requiring them to make it good within a time to be specified therein, not less than thirty nor more than ninety days from the service of such requisiton. * * *

§ 82. *When receiver shall not be appointed, or new policies issued.*—No receiver for any life insurance corporation shall be appointed if such corporation has actual funds invested according to law, of a net cash value equal to its outstanding liabilities, exclusive of any contingent liability incurred under the provisions of section seventy-one of this chapter relating to the organization of a mutual corporation, and a sufficient reserve on policies and claims not matured, calculated according to the American experience table of mortality,

with interest at four and one-half per centum per annum, and in computing such liabilities, capital stock shall be considered as a liability of the corporation. But no such corporation shall issue new policies if its capital stock is impaired to the extent of fifty per centum thereof, after charging said corporation with a reserve liability calculated according to the provisions of section eighty-four of this chapter, until such impairment is made good; in the case of a corporation having no capital stock, it shall not issue new policies if its assets are less than its liabilities as above defined and upon the basis last before mentioned, until such deficiency is made good.

§ 83. *Distribution of surplus to policyholders.*— Except as herein provided, every domestic life insurance corporation heretofore or hereafter organized, whether incorporated by special act or under a general statute, anything in its charter or certificate of incorporation or in such special act or general statute to the contrary notwithstanding, shall provide in every policy issued on or after the first day of January, nineteen hundred and seven, that the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise. Upon the thirty-first day of December of each year, or as soon thereafter as may be practicable, every such corporation shall well and truly ascertain the surplus earned by such corporation during said year. After setting aside from such surplus such sums as may be required for the payment of authorized dividends upon the capital stock, if any, and such sums as may properly be held for account of existing deferred dividend policies and for a contingency reserve not in excess of the amount prescribed in this article,

every such corporation shall apportion the remaining surplus equitably to all other policies entitled to share therein. * * *

§ 86. *Assets and liabilities of life and casualty insurance corporations; method of computation; procedure in case of impairment; reserve.*—1. In estimating the condition of any life insurance corporation, under the provisions of this chapter, or in any examination made by him, or by an examiner appointed by him, the superintendent shall allow as assets only such investments as are authorized by the laws of this state, and shall charge as liabilities, in addition to the capital stock, all outstanding indebtedness of the corporation, and the premium reserve on policies, and additions thereto in force computed according to the table of mortality and rate of interest prescribed in this article. * * *

§ 87. *Contingency reserve.*—Any domestic life-insurance corporation may accumulate and maintain in addition to an amount equal to the net values of its policies computed according to the standard adopted by it under section eighty-four of this chapter a contingency reserve not exceeding the following respective percentages of said net values, to wit: When said net values are less than one hundred thousand dollars, twenty per centum thereof or the sum of ten thousand dollars, whichever is the greater; when said net values are greater than one hundred thousand dollars, the percentage thereof measuring the contingency reserve shall decrease one-half of one per centum for each one hundred thousand dollars of said net values up to one million dollars; one-half of one per centum for each additional one million dollars up to ten mil-

lion dollars; one-half of one per centum for each additional two million five hundred thousand dollars up to fifteen million dollars; and if said net values equal or exceed the last-mentioned amount, the contingency reserve shall not exceed ten per centum thereof; provided that as the net values of said policies increase and the maximum percentage measuring the contingency reserve decreases such corporation may maintain the contingency reserve already accumulated hereunder; although for the time being it may exceed the maximum percentage herein prescribed, but may not add to the contingency reserve when the addition will bring it beyond the maximum percentage. Provided, however, that nothing herein contained shall be construed to affect any existing surplus or contingency reserves held by any such corporation save that whenever the existing surplus and contingency reserves, exclusive of said net values and of all accumulations held on account of existing deferred dividend policies or groups of such policies, shall exceed the limit above mentioned it shall not be entitled to maintain any additional contingency reserve. Provided further, that for cause shown, the superintendent of insurance may at any time and from time to time permit any corporation to accumulate and maintain a contingency reserve in excess of the limit above mentioned for a prescribed period, not exceeding one year under any one permission, by filing in his office a decision stating his reasons therefor and causing the same to be published in his next annual report. This section shall not apply to any corporation doing exclusively a nonparticipating business. (As amended by Laws of 1920, c. 420.)

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

Nos. 93 and 160.—October Term, 1930.

New York Life Insurance Company, Petitioner, 93 *vs.* Frank Collis Bowers, Executor of Frank K. Bowers, Collector of Internal Revenue for the Second District of the State of New York.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Frank Collis Bowers, Executor of Frank K. Bowers, Collector of Internal Revenue for the Second District of the State of New York, Petitioner, 160 *vs.* New York Life Insurance Company.	

[April 13, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

The company sued the collector in the district court, southern district of New York, to recover capital stock taxes exacted under § 1000 (c) of the Revenue Act of 1918[1] for four years ending June 30, 1922. A jury was waived and the case was submitted on an agreed statement of facts. The court held the taxes for the first three years were rightly collected and as to the causes of action alleged on account of them dismissed the complaint. It held that, by reason of the Revenue Act of 1921, 42 Stat. 227, 261, the capital stock tax did not apply to the last year, and gave plaintiff judg-

[1](c) " . . . The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return . . ." 40 Stat. 1126.

ment for the amount paid for that period. 34 F. (2d) 60. On the company's appeal (No. 93 here) and the collector's cross-appeal (No. 160) the Circuit Court of Appeals affirmed the judgment. 39 F. (2d) 556.

The company is a New York corporation without capital stock engaged in mutual life insurance on the level premium plan. It made a return for each of the years showing no tax. After auditing the returns, the Commissioner of Internal Revenue assessed the taxes in question.

By means of an accepted mortality table and an assumed rate of interest, the company calculates the amount that would be required to be paid by the insured each year in advance to cover policy claims if deaths occur as indicated by the table and if that rate of interest is realized on the investments. The amount so ascertained is called the net or mathematical premium. There is added loading to cover expenses and unforeseen contingencies such as excess mortality, diminished interest, investment losses and higher taxes. The premium so built up is named in the policy and constitutes the maximum that the company may require the insured to pay.

The amount by which the premium exceeds the company's actual cost must be returned to the policyholder. *Penn Mutual Co.* v. *Lederer*, 252 U. S. 523, 525. Some of the company's policies are on the annual dividend plan, which requires it to account for divisible surplus and to make yearly distribution to the policyholders. The other policies are on the deferred dividend plan and provide for holding the overpayments to the credit of the deferred dividend policyholders as a class, accumulating them at interest and paying to each holder of a policy in force at the time designated therein his share of the accumulated sum.

As soon as practicable after the expiration of each calendar year, the company takes an account of its business, ascertains the surplus earned that year, and determines the amount which safely may be distributed out of the surplus for that and prior years. By the laws of New York and of other States where the company does business, it is required annually to file a statement showing, among other things, income and disbursements in, and its assets and liabilities at the end of, the preceding year. Item 35 on the form used shows dividends apportioned and payable to an-

nual dividend policyholders to and including December 31 following. Item 36 covers dividends apportioned and payable to deferred dividend policies in the same period. Item 37 shows the amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon deferred dividend policies not included in item 36.

Section 1000 (c) imposes a tax on each mutual insurance company's "surplus or contingent reserves maintained for the general use of the business". The Commissioner based the capital stock taxes for each year on the total of items 35, 36 and 37 as disclosed by the company's annual statements filed for the years ending respectively December 31, 1917, 1918, 1919 and 1920.

1. These items represent surplus within the meaning of subdivision (c).

The sums to be paid as dividends are not a part of the insurance specified in the policies. They are derived from amounts which, from abundant caution, are included in the advance premiums over and above what is found by actual experience to be necessary to pay the cost of the insurance and the expenses of carrying on the business. They indicate a "surplus", i. e., assets in excess of what is deemed necessary to provide for the payment when due of the amounts specifically covered by the policies.

No money or property is set aside on account of such dividends. The items in question do not constitute liabilities. They are merely accounting entries to show the amounts presently available for dividends currently payable and as well the fund accumulated in respect of deferred dividends. Such entries are analogous to those in balance sheets of business corporations which show capital stock as a liability. And until actually paid out as dividends the money or securities used for that purpose properly may be deemed to be maintained for "the general use of the business".

Under the company's construction of subdivision (c) it was not liable for the tax for any year while the 1918 Act was in force. According to its returns it had no "surplus or contingent reserves". The company does not suggest and there is no reason to suppose that, in respect of assets properly so to be classed, it is not typical of mutual insurance companies generally. When regard is had to the well-known and necessary practice of mutual insurance companies to collect in advance premiums in excess of

total costs and to pay dividends out of the resulting surplus it is clear that the company's construction is unreasonable. It would operate to defeat the plainly expressed purpose of Congress to impose a capital stock tax on mutual insurance companies.

2. The company contends that in any event subdivision (b) of § 1000 requires that item 37 be excluded from the amount used to measure the excise.

That provision is: "In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included." The legislative history of § 1000 goes far to make its meaning clear. Section 407 of the 1916 Act imposed upon corporations a special excise measured by the value of their capital stock. 39 Stat. 789. Its scope was not clear. At first the Treasury Department ruled that as mutual insurance companies have no capital stock the section did not apply to them. Regulations 38, Art. 2 (b). That construction was later reversed. Regulations 38 (Revised) Art. 3. And see *Lumber Fire Ins. Co.* v. *Malley*, 44 F. (2d) 553.

In the bill for the Revenue Act of 1918 as it passed the House, § 1000 was substantially the same as § 407 of the 1916 Act. The Senate substituted provisions to tax the incomes of insurance companies. In conference, the original § 1000 was restored, and there was added to it the provision in paragraph (c) which specifically declares that the taxes imposed by that section shall apply to mutual insurance companies. The provision added was complete in itself. It specified the rate and indicated the basis on which the tax was to be calculated; it was adequate to govern the ascertainment of the amount and there is nothing to indicate an intention that the language there used should be modified by anything in subdivision (b). It is clear that (c) was intended exclusively to govern mutual insurance companies, and that (b) applies only to stock insurance companies.

3. The company insists that § 1000 of the 1918 Act did not impose a tax for the year ending June 30, 1921.

The Treasury Department ruled that the taxes imposed by § 407 of the 1916 Act were payable in advance for the year commencing July 1 and that construction was followed while the section re-

mained in force. Undoubtedly Congress intended that the same rule should be followed under the substitute provision, § 1000 of the 1918 Act. And the Treasury Department so construed it. The 1918 Act was not approved until February 24, 1919. The year commencing July 1, 1918, was the first for which it imposed the capital stock tax. See *Hecht* v. *Malley*, 265 U. S. 144, 163. And this company's annual statement for 1917 was the basis on which the Commissioner made his calculations. The legislative history and the administrative construction make it clear that such taxes were payable in advance.[2]

The taxes for the third year under the 1918 Act were calculated on the insurance company's annual statement for the calendar year 1919 and were payable in advance for the fiscal year commencing July 1, 1920. There is nothing in the 1921 Act, which was not approved until November 23, to suggest that Congress intended that capital stock taxes so payable in 1920 were to be returned if already paid or canceled if delinquent. The company was rightly held for that year's tax.

4. The collector maintains that despite the 1921 Act the company is liable under § 1000 of the 1918 Act for the capital stock tax for the year ending June 30, 1922.

Section 243 of the 1921 Act imposes a tax upon the net income of every insurance company for the calendar year 1921 and each taxable year thereafter. It declares that tax to be in lieu of other taxes imposed by that Act, namely income taxes on corporations generally, § 230, capital stock taxes, § 1000, and profits taxes, Title III. Section 1400 (a) repealed, to take effect January 1, 1922, Title X of the 1918 Act, which includes § 1000. Section 1400 (b) provides: "In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision [of the 1918 Act] imposing such tax shall remain in force until the corresponding tax under this Act takes effect". The income tax imposed by

[2]Art. 3, Regulations 38, promulgated October 19, 1916, under Revenue Act of 1916. Form 707, 20 T. D. 470. Art. 1, Regulations 38 (Revised), promulgated August 9, 1918, under Revenue Act of 1916. Art. 1, Regulations 50, promulgated April 29, 1919, under Revenue Act of 1918. Art. 1, Regulations 50 (Revised), promulgated June 21, 1920, under Revenue Act of 1918. Art. 2, Regulations 64 (1922 ed.), promulgated June 15, 1922, under Revenue Act of 1921.

§ 243 is declared to be in lieu of capital stock tax in § 1000 of the same Act. And, as the latter tax was in lieu of the capital stock tax imposed by § 1000 of the 1918 Act, it reasonably may be said that the income tax imposed by § 243 was intended to be in lieu of the capital stock tax of § 1000 of the 1918 Act.

This income tax was one "corresponding" to the capital stock tax under § 1000 of the 1918 Act within the meaning of § 1400 (b). And under that provision the last mentioned tax remained in force until the former took effect. The income tax imposed by § 243 was "for the calendar year 1921". Section 1400 (b) makes it plain that there was no intention to subject insurance companies to both taxes for the same period. The 1921 Act operated to cancel or remit the capital stock tax for that year. The company is entitled to recover the amount collected for that period.

In No. 93 judgment affirmed.
In No. 160 judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.